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In the
Supreme Court of the United States

LOREN DAVID,

Petitioner,

v.

MONSANTO COMPANY AND
MONSANTO TECHNOLOGIES LLC,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc., 534 U.S. 124 (2001), the Supreme Court held that a *35* U.S.C. § 101 patent could be obtained on a plant variety, although Congress had enacted two later, plant-specific statutes, the Plant Variety Protection Act of 1970 ("PVPA"), 7 U.S.C. § 2321 et seq. (which provides that farmer seed saving and plant variety research do not constitute infringement), and the Plant Patent Act of 1930 ("PPA"), 35 U.S.C. §§ 161-164. However, the *J.E.M.* Court instructed that to obtain a § 101 patent on a plant variety (and its accompanying rights of exclusion) an inventor must satisfy § 35 U.S.C. § 112's demanding description requirement by describing the plant variety with sufficient specificity to enable others to make and use the invention after the patent term expires, and must make a deposit of seeds in a depository accessible to the public. The following questions are presented:

1. In view of the Supreme Court's decision in J.E.M., 534 U.S. 124 (2001), do *35* U.S.C. §§ 101 and 112, when read together with the PVPA and PPA, authorize an action for infringement of a § 101 patent on only a DNA sequence that does not describe any plant variety, does not include a publicly accessible deposit of any seed, and does not enable one to make and use any specific plant variety, against a farmer for saving and planting seed of an unidentified plant variety merely because laboratory tests show the presence of the patented DNA sequence in the plant variety?

2. Do Federal Rules of Evidence 803(6) and 703, when read together, allow a party's paid testifying expert to base his testimony on a report of seed tests performed by another of the same party's paid experts *who did not testify* when those tests were performed by the non-testifying expert *for the purposes of the present litigation* and not in the ordinary course of business?

3. Is a federal statutory award of attorney fees, expert expenses, and costs in a private law action (not a civil rights action involving important civil and constitutional rights providing a broader, uncompensated benefit to the public), in the amount of $487,000, reasonable in relation to the result achieved, a compensatory damage award of $226,000 (which was remanded to the District Court on April 21, 2008, for reduction as clearly erroneous, with no decision yet)?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Loren David petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 516 F.3d 1009 (Fed. Cir. 2008) and is reproduced in the Appendix at 1a. The reported opinions of United States District Court for the Eastern District of Missouri are at 448 F. Supp.2d 1088 (2006) (App. 44a), 448 F. Supp.2d 1095 (2006) (App. 28a), and 2006 WL 3079059 (App. 22a).

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on February 5, 2008 (App. at 1a). The Court of Appeals denied a timely petition for rehearing *en banc* on April 14, 2008. This Court granted an extension of time to August 12, 2008, to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Pertinent statutory provisions and administrative materials are included in the App. at 61a-71a.

STATEMENT OF THE CASE

1. On April 12, 2004, Respondents, Monsanto Company and Monsanto Technologies, LLC

("Monsanto") sued Petitioner Loren David ("David") in the United States District Court for the Eastern District of Missouri claiming David infringed Patent No. 5,352,605 ("'605 patent") by planting in the crop year 2003 soybean seed David allegedly saved from the crop he harvested in 2002. David denied the charge and to this day maintains he is innocent. The District Court had jurisdiction under 28 U.S.C. § 1338(a) because this is a civil action arising under the United States patent laws.

2. "Roundup Ready" (also "RR") is Monsanto's trade name for seed that laboratory tests show contains the DNA sequence that is the subject of the '605 patent.

3. *McFarling v. Monsanto Co.*, 363 F.3d 1336, 1339 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005), describes the '605 patent:

> United States Patent No. 5,352,605 ("the '605 patent") relates to the use of a particular promoter in genetically modified plant cells. The '605 patent claims, *inter alia*, DNA sequences and plant cells containing the promoter. A promoter sequence is a DNA sequence located in proximity to the DNA sequence that encodes a protein and that, in part, tells the cellular machinery how much of the protein to make.

Timothy Conner, Monsanto Senior Director, Oil Seeds and Food Technology, testified that: nowhere does the '605 patent describe any specific plant variety; a person knowledgeable in the art of plant breeding

cannot take the information in the '605 patent and know how to grow any specific plant variety; and there was no publicly accessible deposit of any seed of a specific soybean plant variety that was made in conjunction with the '605 patent. (Fed. Cir. App. 86-89, 90-91, 91-92)

4. The District Court entered judgment September 14, 2006, against David for $787,000 plus post-judgment interest: $226,214.40 compensatory damages; $10,000 enhanced damages; $323,140.05 attorney fees; $164,608.03 costs and expert expenses; $63,026.95 prejudgment interest. (App. 26a)

5. In 2003, a unit of RR soybean seed purchased at the seed store cost $21. Out of that Monsanto received a $7.75 "tech fee." The remainder of the $21 went to the seed company that produced and owned the specific soybean plant variety, and to the seed store that sold it.

6. Monsanto's retained expert Mark Hoffman testified he did not know what revenue Monsanto lost per unit of saved seed or whether it exceeded the $7.75 tech fee, and that he could have quantified that but was not asked by Monsanto to do so. (Fed. Cir. App. 179-180)

7. Hoffman testified that David by planting saved seed would have lost $12 from extra cost/lost yield compared to planting new purchased seed, and therefore would have saved only $9 per unit of saved seed planted ($21 - $12 = $9). (Fed Cir. App. 184-185)

8. The District Court found David in 2003 planted 4,110 units of infringing saved RR seed (remanded for reduction, *supra*, n. 1). This amounts to a loss to Monsanto of $31,852.50 in "tech fees." (4110 x $7.75 = $31,852.50) It amounts to a gain by David, after extra saved seed expenses, of $36,990. (4110 x $9 = $36,990) The judgment is $787,000 (plus post-judgment interest), which is over 100 times the only actual revenue loss ($7.75 tech fee) Monsanto proved.

9. Shortly after the expert witness deadline in November 2004, David and his prior counsel severed their relationship. While unrepresented, David commissioned independent plant variety testing to prove what specific plant varieties were represented in the seed samples Monsanto took from David's plowed fields in April 2004 (long after the 2003 growing season and after David routinely discarded his planting records). He testified he did so because he knew what the tests would show. These tests showed that the only RR soybean variety David ever planted before 2003, the 2070 RR variety that he legally bought and planted in 2002, *was not* in Monsanto's seed samples. Further, the plant variety tests showed the three RR soybean varieties Monsanto concedes David legally purchased in 2003 *were* in the Monsanto samples of seed grown in David's fields in 2003. (Fed. Cir. App. A587-583) The variety test dendogram shows the genetic distance between 2070 RR and Monsanto's seed samples is far greater than the genetic distance between the samples and the three varieties David legally purchased in 2003. (Fed. Cir. App. 582) The variety tests exonerate David.

10. David's present counsel was retained shortly before the discovery deadline (extended once when David was unrepresented). David's motion for leave to take a deposition of the expert who performed the plant variety tests exonerating David was denied because he was not designated and the test results were excluded because the expert performing the tests (Russell Rasmussen, Ph.D., STA Laboratories, Longmont, CO) could not testify to provide foundation. Monsanto objected: "Moreover, Defendants' request is futile because this Court has already excluded any evidence or testimony from ... Dr. Rasmussen which necessarily includes the documents that contain [his] test results and/or opinions." (Plaintiff's Opposition to Defendant's Motion for Reconsideration, p. 1, Dist. Ct. Docket 84) Monsanto's objection was based on the fact Dr. Rasmussen performed the plant variety tests for purposes of litigation. "Defendant did not send the alleged 2003 soybean samples to these individuals or their employers in the ordinary course - he sent them as part of his defense of this litigation."

11. One of Monsanto's paid experts was Fritz Koppatschek, Director of Ag Sampling for the company Agri Business Group/Ag Sampling Service. (Fed. Cir. App. 56) Another Monsanto paid expert, Brian Ojala, Director of Bio Lab Solutions, after suit was filed performed *for purposes of this litigation* molecular biological testing on the seed samples Monsanto alleged it took from David's fields in April, 2004. BioLab Solutions is part of Agri Business Group, which has been paid 2.4 million dollars by Monsanto on this and other cases. (Fed. Cir. App. 149A, 162 A-163) *Ojala did not testify*. His written report of seed testing activities was nevertheless admitted, over

objection based on Federal Rules of Evidence 803(6) and 703, through the testimony of Koppatschek. Koppatschek's report incorporated Ojala's three-page seed test report. (App. 72a-80a; Exhibit 358, Fed. Cir. App. 48-52) Koppatschek himself authored only two sentences relating to the seed tests:

> Lab Analysis
>
> After review lab results, all soybean fields sampled tested positive for the CP4 EPSPS protein associated with the Roundup Ready gene. These fields totaled 2106.5 acres.

(Fed. Cir. App. 49)

12. The Federal Circuit Panel issued its opinion on February 5, 2008, affirming the District Court's judgment, with one exception. The $226,000 compensatory damage award was remanded for reduction because the seed planting rate used by the District Court was clearly erroneous. *David v. Monsanto Company*, 516 F.3d 1009, 1019 (Fed. Cir. 2008). There has been no decision yet on the remanded issue. Rehearing *en banc* was denied April 14, 2008.

13. The Federal Circuit Panel based its ruling of infringement on its conclusion that "....Monsanto presented [nontestifying] Ojala's scientific field tests demonstrating that David's soybean fields have been planted exclusively with RR soybeans....". These were DNA sequence tests only, *not plant variety tests*. Ojala's test conclusions that the '605 gene sequence was present in every seed sample tested was one of

"three *crucial* pieces of evidence" necessary to prove Monsanto's claim of infringement. (Monsanto Fed. Cir. Brief at 10; emphasis added) Ojala's test conclusions were "crucial" because Monsanto's theory was that though David had legally purchased RR seed in 2003 it was not enough to explain Ojala's tests.

14. Over $487,000 in attorney fees, expert expenses, and costs were awarded for achieving only a $226,000 compensatory damage award that was remanded for reduction.

REASONS FOR GRANTING THE WRIT

I. This Court Should Review Whether 35 U.S.C. §§ 101 and 112, When Read Together with the Plant Variety Protection Act of 1970 and Plant Patent Act of 1930, Authorize an Action for Infringement of a § 101 Patent on Only a DNA Sequence That Does Not Describe Any Plant Variety, Does Not Include a Publicly Accessible Deposit of Any Seed, and Does Not Enable One to Make and Use Any Specific Plant Variety, Against a Farmer for Saving and Planting Seed of an Unidentified Plant Variety Merely Because Laboratory Tests Show the Presence of the Patented DNA Sequence in the Plant Variety

A. The question is important.

The Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction over patent decisions of all federal district courts (except for patent issues arising only in a counterclaim). The Federal Circuit

denied rehearing *en banc* and therefore the Panel's decision becomes the entrenched position of the Federal Circuit, binding on federal district courts throughout the nation.

Supreme Court Practice, Gressman, Geller, Shapiro, Bishop and Hartnett, 9th Ed., 2007, states at 287:

> Importance may be found in the Federal Circuit's treatment of patentability standards, or in its treatment of an exceptionally significant patent, or in its application of prior Supreme Court precedent, or in its treatment of combination patents - to mention some of the more obvious factors. See *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727 (2007); *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193 (2005); *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001); *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993).

The Federal Circuit's decision on this issue triggers the first three of these four "more obvious factors." The decision involves treatment of patentability standards (first factor) because its practical effect is to allow an inventor to enforce patent exclusion rights against a farmer for any plant variety that laboratory tests show contains the inventor's patented DNA sequence even though the inventor has no patent on the plant variety. The decision allows this even though the DNA patent does not describe the plant variety, does not make a publicly accessible deposit of seed, and thus does not enable one skilled in the art to

make and use the plant variety at the expiration of the patent monopoly (¶ 3, p. 2, *supra*).

The decision also involves an exceptionally important patent (second factor). Ninety percent of U.S. soybean acres are planted in soybean plant varieties that test positive in a laboratory for the '605 patented DNA sequence. (Monsanto's Federal Circuit Brief, p. 3). Thus, the Federal Circuit's decision granting the '605 DNA patent vastly expansive rights of exclusion against farmers applies to nearly all soybean fields in the nation.

The third factor is clearly triggered because the Federal Circuit's decision is in stark conflict with *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001) (cited above, page 8, in Supreme Court Practice at 287). The Federal Circuit's misinterpretation of *J.E.M.* is a conflict with Supreme Court precedent that is both direct and readily apparent. In 1980 the Supreme Court in *Diamond v. Chakrabarty*, 447 U.S. 303, 313, held that 35 U.S.C. § 101 [App. 66a] was expansive enough to allow patents on living things (there a man-made micro-organism). Following *Chakrabarty*, the Court in *J.E.M.* held that the existence of two later enacted, plant specific statues, the Plant Patent Act of 1930 ("PPA") 35 U.S.C. §§ 161-164 [App. 67a-68a], and the Plant Variety Protection Act of 1970 ("PVPA"), 7 U.S.C. § 2321, et seq. [App. 61a-65a], did not necessarily preclude issuance of a § 101 patent on a plant variety. 534 U.S. at 142-143. However, *J.E.M.* instructs that to obtain a patent on a plant variety (and its accompanying rights of exclusion) an inventor "must satisfy § 101's demanding description

requirement ..." [at 134], "must describe the plant with sufficient specificity to enable others to 'make and use' the invention after the patent term expires ..." [at 142], and must make "a deposit of biological material, for example, seeds, [in a depository] accessible to the public [at 142]." The Federal Circuit's decision below, however, accords the '605 patent the same rights of exclusion held by a patent on a plant variety, yet the '605 DNA patent describes no plant variety, includes no publicly accessible seed deposit, and does not even claim a plant variety.

Certiorari is often granted to clarify a matter where it is charged that the court of appeals has misconstrued an applicable Supreme Court opinion (*Elder v. Holloway*, 510 U.S. 510, 515 (1994); *SEC v. Edwards*, 543 U.S. 389, 392-393 (2004)), or misapprehended a Supreme Court opinion (*Schlude v. Commissioner*, 372 U.S. 128, 130 (1968)), or misconceived a Supreme Court opinion (*Wilkinson v. United States*, 365 U.S. 399, 401 (1961)), or where the Court of Appeals decision "appeared to be in conflict with our precedents" (*Army Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982)). "Where the decision of the Court of Appeals clearly fails to apply prior Supreme Court decisions because of error or oversight, the Court usually grants certiorari. *See, e.g., Fullers v. United States*, 540 U.S. 519 [524-525] (2004) ..." *Supreme Court Practice* at 250.

The very best possible light that can be shown upon the Federal Circuit's decision would be a contention that the Supreme Court's language in *J.E.M.* may be ambiguous when applied to a situation the *J.E.M.* court did not have in mind: suing a farmer for

infringing a DNA sequence patent. This too would merit a grant of the writ. *See Gonzaga University v. Doe*, 534 U.S. 273, 278 (2002).

B. The Federal Circuit decided the question incorrectly.

When the Supreme Court decided *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 140-141 (2001), the court recognized that Congress in enacting the PPA and the PVPA intended that farmers be treated differently. *See*, 534 U.S. at 132-133, 138-140. The court therefore construed the PPA, the PVPA and § 101 together. 534 U.S. at 143-144; and at 146 (J. Scalia concurring). That is why in *J.E.M.* the court emphasized as the basis for its holding that a § 101 patent could be granted on a *plant variety* but it "must satisfy § 101's demanding description requirement." 534 U.S. at 134.

Before enacting the PVPA, the federal government engaged in a great deal of study concerning extending federal protection to sexually reproducing plant varieties. On July 23, 1965, a presidential commission was appointed to review the operation of the United States patent system. It spent eighteen months accomplishing this review. Patent Law Revision Hearings, Subcommittee on Patents, Trademarks and Copyrights, Senate Judiciary Committee, 90th Cong. 2nd Sess., 1968, Part 3, p. 648. One recommendation of the presidential commission was that all provisions in the patent law for plant patents be deleted. *Id.* The U.S. Department of Agriculture opposed a proposed amendment to expand the coverage of 35 U.S.C. §§ 161-164 to include sexual reproduction of plants.

Id. at 715. These references are offered to remind us of the extent of the continuing political debate that preceded the passage of the 1970 PVPA.

In *J.E.M.*, the U.S. Supreme Court held that the PPA and the PVPA do not provide the exclusive means for obtaining federal statutory protection of plant varieties, and that the other means of obtaining federal statutory protection of a plant variety is a 35 U.S.C. § 101 utility patent on a *plant variety*. 534 U.S. at 140-143. The '605 patent claims and describes a DNA sequence, not a plant variety (¶ 3, p. 2, *supra*). However, the court in *J.E.M.* explained, at 534 U.S. 131, that to obtain a § 101 patent on a plant variety "...the patent must meet the specifications of § 112 [App. 66a], which require a written description of the plant and a deposit of seed that is publicly accessible. See 37 CFR §§ 1.801-1.809 (2001)."

The relaxed written description requirements of the PVPA and PPA require that the plant variety description be "as complete as possible." 7 U.S.C. § 2422(2); 35 U.S.C. § 162. [App. 67a] The *J.E.M.* court said that on the other hand a § 101 patent on a *plant variety* "must satisfy § 101's demanding description requirement." 534 U.S. at 134. The court in *J.E.M.* concluded that the PVPA and PPA are not statutory bars to granting § 101 patents on plant varieties because it is harder to obtain a § 101 patent on a plant variety: "Because it is harder to qualify for a utility patent than for a plant Variety Protection (P.V.P.) certificate, it only makes sense that utility patents would confer a greater scope of protection." 534 U.S. at 138. The PVPA exemptions for seed saving (7 U.S.C. § 2543; App. 65a) and research (7 U.S.C.

§ 2544; App. 65a) do not apply to a § 101 patent on a *plant variety* because the § 101 patent is more difficult to obtain. 534 U.S. at 140, 142 [App. 66a].

In *J.E.M.* the more stringent § 112 written description requirement for obtaining a §101 patent on a *plant variety* is the core of the Court's reasoning leading to the conclusion that the PPA and the PVPA do not evidence a Congressional intent that a §101 patent can never issue *on a plant variety*. At 534 U.S. 142-143, the Court explained:

> It is much more difficult to obtain a utility patent for a plant than to obtain a PVP certificate because a utility patentable plant must be new, useful, and nonobvious, 35 U.S.C. §§101-103. In addition, to obtain a utility patent, a breeder must describe the plant with sufficient specificity to enable others to "make and use" the invention after the patent term expires. §112. The disclosure required by the Patent Act is "the *quid pro quo* of the right to exclude." [citation omitted]. The description requirement for plants includes a deposit of biological material, for example, seeds, and mandates that such materials be accessible to the public. See 37 CFR §§ 1.801-1.809 (2001); see also App. 39 (seed deposits for the U.S. Patent No. 5,491,295).
>
> ....Nor does the PVPA require a description and disclosure as extensive as those required under § 101....

> Because of the more stringent requirements, utility patent holders receive greater rights of exclusion than holders of a PVP certificate. Most notably, there are no exemptions for research or saving seed under a utility patent.

534 U.S. at 142-143; *see also* 534 U.S. at 143-144.

Nothing in the Court's analysis in *J.E.M.* supports the Federal Circuit's position that an action for infringement against a farmer who allegedly saves seed and replants it on his own farm can be based on a patent on a DNA sequence, like the '605 patent, which does not claim seeds or plants, contains no specific description of a *plant variety*, and does not include any deposit of seed accessible to the public (¶ 3, *supra*, p. 2).

The Federal Circuit Panel sets out its holding at 516 F.3d 1014:

> Contrary to David's argument on appeal, nothing in *J.E.M.* invalidates or limits the '605 patent or any utility patent on a gene sequence in a seed or a plant. In fact, in *J.E.M.*, the Supreme Court explicitly refused to limit the extent of patentable subject matter: "we decline to narrow the reach of § 101 where Congress has given us no indication that it intends this result." *J.E.M.*, 534 U.S. at 146-47, 122 S.Ct. 593. The '605 patent covering the gene sequence is infringed by planting a seed containing the gene sequence because the seed contains the gene. The gene itself is being used in the planting, an infringing act.

The Panel misinterpreted the *J.E.M.* Court's intent when it said, "we decline to narrow the reach of § 101 where Congress has given us no indication that it intends this result." The *J.E.M.* Court there was speaking to whether a plant variety *could ever* be the subject of a § 101 patent. The Court was not saying that the PVPA and the PPA do not inform us of the intent of Congress as to what is required of an inventor to obtain a patent on a *plant variety*. The intent of Congress can be determined only by reading all three statutes together. *J.E.M.* at 534 U.S. 143-44 and at 146 (Justice Scalia's concurrence); *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

The *J.E.M.* majority opinion, concurring opinion, and dissent, all had one thing in common. They were all deciding whether Congress intended to allow the grant under § 101 of a patent on a *plant variety*. Nowhere in any of the *J.E.M.* opinions is there even an implication that, as the Federal Circuit held, the owner of a patent that does not describe a *plant variety* under § 112 can nevertheless recover damages from a farmer for exercising the age-old right to save seed from a plant variety.[1]

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[1] When the 1994 PVPA Amendments removed from 7 U.S.C. § 2543 the right of a farmer to sell saved seed, the House Report (Agricultural Committee) No. 103-699, Aug. 12, 1994 (To Accompany H.R. 2927), provided in Section 10, p. 17: "It is not the intent of the Committee that deletion of the provision allowing the sale of saved seed to be viewed as a step toward the eventual end to the traditional right of farmers to save seed for use on their own holdings."

Justice Scalia's analysis in his concurring opinion in *J.E.M.* is instructive:

> This case presents an interesting and difficult point of statutory construction, seemingly pitting against each other two perfectly valid canons of interpretation: (1) that statutes must be construed in their entirety, so that the meaning of one provision sheds light upon the meaning of another; and (2) that repeals by implication are not favored. I think these sensible canons are reconcilable only if the first of them is limited by the second.

534 U.S. at 146. Justice Scalia decided it had been resolved that § 101 covered the subject matter of living things and thus covered plants, so he concurred with the majority, which upheld granting a § 101 patent that *described a plant variety*. *Id.* at 146-147.

Now that *J.E.M.* has decided that the right to obtain a § 101 patent on a *plant variety* was not repealed by implication by passage of the PPA and PVPA, Justice Scalia's first canon of interpretation must be followed. The PPA, PVPA and § 101 and § 112 must be construed together. Thus, in deciding whether a § 101 patent that *does not* describe a *plant variety* can support an infringement action against a farmer for seed saving, 35 U.S.C. §§ 101 and 112 must be read together with the PPA and PVPA. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). The Court in *J.E.M.* said at 534 U.S. 143-144:

> The plain meaning of § 101, as interpreted by this Court in *Chakrabarty*, clearly includes plants within its subject matter. The PPA and the PVPA are not to the contrary and can be read *alongside § 101 in protecting plants*.

The PPA and PVPA construed together with 35 U.S.C. §§ 101 and 112 show the intent of Congress to treat federal protection of plant varieties differently than federal protection of living things that are not plants and not produced by farmers. *See*, 534 U.S. at 132-133, 138-140. *J.E.M.* makes clear that the extent of federal protection of plant varieties depends on the extent of the patent holder's ability to particularly describe the plant variety and deposit its seed. A patent describing only a DNA sequence, like the '605 patent, does not fit within this statutory scheme. Monsanto argued below that the '605 patent covers "any plant or seed that contains such a gene, just as a patent on a drug covers any pill in which the drug is an active ingredient." Such analogies are inapposite where, unlike plants, there are no pill-specific, later enacted federal statutes (like the PVPA and PPA) specifically designed to protect pills that exist alongside 35 U.S.C. §§ 101 and 112, and which therefore would inform the determination of Congress' intent in extending federal protection to pills. Congress has treated plant varieties, and farmers, specifically and differently.

The PVPA's infringement provisions apply to "any variety that is essentially derived from a protected variety. . . ." 7 U.S.C. § 2541(c)(1) (added by 1994 PVPA Amendments, Pub. L. 103-349, § 9(3)). Section 2401(a)(3)(B) provides:

> Methods
>
> An essentially derived variety may be obtained by the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, *transformation by genetic engineering*, or other method. [Emphasis added.]

[App. 62a]

The *J.E.M.* Court knew Congress has provided that PVPA protection can extend to plant varieties created through the use of "genetic engineering." Thus, the PVPA provides alternative federal protection to developers of bioengineered plant varieties who cannot meet the § 101 stringent description and seed deposit requirements. The Court in *J.E.M.* accordingly did not except genetically engineered plant varieties from the stringent written description and seed deposit requirement for obtaining a § 101 patent on a *plant variety*.

If Monsanto was required to prove, as an element of infringement by a farmer, that a specific patented plant variety was in his fields and that he planted that specific variety the prior year, Monsanto would have to perform plant variety tests to prove infringement. (David commissioned his own variety tests to exonerate himself, but they were excluded. ¶¶ 9-10, *supra*, pp. 4-5.) The Federal Circuit's position allows Monsanto to test only for the presence of the '605 patent's DNA sequence and then launch a barrage of lawyers and experts ($487,000 in Petitioner's case

through trial) to build a documentary circumstantial evidence case.

On the other hand, Monsanto admitted it could protect its RR technology by employing a system coupling its '605 DNA patent with § 101 patents on specific *plant varieties*. Monsanto's witness Doug Dorsey is the U.S. business leader for Monsanto's Asgrow and DeKalb seed businesses. Dorsey testified that Monsanto could refuse to license inserting the '605 patent material in any *plant variety* that is not protected by a § 101 utility patent. Dorsey admitted it would be possible to use a § 101 patent on a *plant variety* to prohibit others from planting saved seed just as Monsanto now does with its '605 patent on a DNA sequence. Dorsey testified that if the law is that the only way a limited license can be used is in conjunction with a patent on a specific plant variety, then Monsanto would consider that in marketing its '605 patent material. Dorsey said the downside for Monsanto of using a patent on a plant variety to restrict use is that "it's a lot more difficult to test for individual varieties than it is to test for the gene." Of course, the converse is that it is a lot more difficult for a farmer to defend against Monsanto's lawyer and expert intensive circumstantial evidence patent prosecution that is based only on a test for the *DNA sequence*, not on proof of saving and planting a *specific patented plant variety*.

Use of a § 101 patented DNA sequence by a competitor in a laboratory to insert the patented sequence into plant tissue is infringement of the '605 patent. Dorsey's testimony acknowledges that the holder of a patented DNA sequence can control this

laboratory step to license use of the DNA sequence only in specific plant varieties that are protected by a § 101 patent. Thus, reading §§ 101 and 112 together with the PVPA and PPA to require that an action against a farmer for seed saving be based on a § 101 patent *on a plant variety* is compatible with enforcement of a § 101 patent on a DNA sequence.

II. This Court Should Review Whether Federal Rules of Evidence 803(6) and 703, When Read Together, Allow a Party's Paid Testifying Expert to Base His Testimony on a Report of Seed Tests Performed by Another of the Same Party's Paid Experts Who Did Not Testify When Those Tests Were Performed by the Non-testifying Expert for the Purposes of the Present Litigation and Not in the Ordinary Course of Business.

A. The question is important.

Like the '605 patent issue, the Federal Circuit's denial of an *en banc* rehearing makes the Panel's decision on this question the entrenched position of the Federal Circuit. The decision conflicts with *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943), which held that a report prepared *for the purpose of the litigation* is not admissible under the relaxed standards applied to business records. The Federal Circuit upheld the District Court's admission of '605 DNA seed tests performed by Monsanto paid expert Brian Ojala *for the purposes of litigation*, over David's objection that *Ojala did not testify*. (¶¶ 10-11, 13, *supra*, p. 5-7) This conflict with *Palmer* is a factor showing the issue is important. (*Supreme Court Practice* at 287, *supra*, p. 8).

A conflict between a decision of the Federal Circuit on general federal law and another circuit court of appeal "is a basis for Supreme Court review of either decision by way of certiorari." *Supreme Court Practice* at 255. The Federal Circuit affirmed the District Court's admission, over David's objection, not only of the Ojala tests but also the testimony of Monsanto paid expert Fritz Koppatschek regurgitating the inadmissible test conclusions. (¶¶ 11, 13, *supra*, p. 5-7) Allowing admission of an expert report prepared *for purposes of litigation* without presenting the authoring expert for cross-examination, and allowing another paid expert to testify to the inadmissible hearsay report's conclusions, conflicts with decisions of the Eighth, Fourth and Seventh Circuits.

A circuit court decision in conflict with the clear requirements of the Federal Rules of Criminal Procedure, Civil Procedure or Evidence also merits certiorari review in exercise of the Supreme Court's judicial supervision duty. *See: McNabb v. United* States, 318 U.S. 332, 340-341 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts" includes the duty of maintaining "standards of procedure and evidence"); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (granting certiorari to clarify trial judge's gate keeping obligation in admission of expert testimony under FRE 702). The interplay between FRE 803(6) and FRE 703 arises in countless district court cases across the nation. The necessity of the Supreme Court issuing a decision clarifying the interplay between these two rules of evidence is of widespread importance.

B. The Federal Circuit decided the question incorrectly.

Issues on the admissibility of evidence in the Federal Circuit appeal below are governed by the decisional law of the Eighth Circuit Court of Appeals. *Wang Laboratories, Inc. v. Applied Computer Sciences, Inc.*, 958 F.2d 355, 357 (Fed. Cir. 1992). The Federal Circuit's approval of Koppatschek's expert testimony based on conclusions of *another nontestifying expert about tests the nontestifying expert performed for purposes of litigation* on seed samples resulted from an erroneous view of the interplay between Federal Rules of Evidence 803(6) and 703.

In *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943), the court affirmed the trial court's decision that a report about a train accident made by the locomotive engineer subsequent to the accident was not admissible under the business record hearsay exception. The court explained:

> In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.[2]

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[2] "*Palmer* was decided under what is sometimes called the Business Records Act then in effect, 28 U.S.C. § 695, which was not different in any respect pertinent here from § 803(6)." *Certain*

The Eighth Circuit Court of Appeals applies the same rule. In *Scheerer v. Hardee's Food Sys. Inc.*, 92 F.3d 702, 706-07 (8th Cir. 1996), *appeal after remand*, 148 F.3d 1036 (8th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999), the court said:

> In addition, the incident report was inadmissible as a business record under Fed.R.Evid. 803(6) because it had been prepared in anticipation of litigation. Even if we assume that Mrs. Fran was the source of the information about Mrs. Scheerer's shoes, the incident report lacks reliability or trustworthiness because it was not made in the ordinary course of business but instead with the knowledge that the incident could result in litigation. *e.g., United States v. Blackburn*, 992 F.2d 666, 670 (7th Cir.) (lensometer report prepared at behest of FBI and with knowledge that any information it supplied would be used in ongoing criminal investigation was not prepared and kept in ordinary course of eyeglasses business), *cert. denied*, 510 U.S. 949, 114 S.Ct. 393, 126 L.Ed.2d 341 (1993); *Picker X-ray Corp. v. Frerker*, 405 F.2d 916, 922-23 (8th Cir. 1969) (hospital report made by business manager after accident which he knew could

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Underwriters at Lloyd's, London v. Sinkovich, 232 F.3d 200, 205, n. 3 (4th Cir. 2000). *Certain Underwriters* also cites at 232 F.3d 205, "*Scheerer v. Hardee's Food Sys. Inc.*, 92 F.3d 702, 706-07 (8th Cir. 1996) (stating that a report lacks trustworthiness because it was made with knowledge that incident could result in litigation)."

> result in litigation was not used for treatment or any other ordinary business purpose but instead with knowledge that incident could result in litigation).

Accord: Picker X-Ray Corp. v. Frerker, 405 F.2d 916, 923 (8th Cir. 1969) (citing *Palmer*); *Chadwell v. Koch Refining Company*, 251 F.3d 727 (8th Cir. 2001) (endorsing *Scheerer*): *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1258-59 (9th Cir. 1984) (citing *Palmer*); *Timberlake Constr. Co. v. U.S. Fidelity and Guaranty Co.*, 71 F.3d 335, 341-43 (10th Cir. 1995) (citing *Palmer*). Nontestifying expert Ojala's DNA test report therefore is not an admissible Rule 803(b) business record.

Testifying expert Koppatschek authored only two sentences in his report that related to DNA testing, simply reiterating Ojala's DNA test conclusions about the extent to which seed in David's fields contained the '605 DNA sequence. (¶ 11, *supra*, p. 4-5) The Panel's opinion held that, "Koppatschek's reliance on the scientific reports prepared by his team is therefore the type of reliance that is reasonable for expert witnesses [under Rule 703]." 516 F.3d at 1015. Because "his team" did not testify and "his team" prepared the DNA report *for purposes of litigation*, the Federal Circuit's *en banc* endorsement of the holding conflicts with decisions of the Eighth Circuit, and other Circuit Courts of Appeal. The court in *United States v. Tran Trong Cuong, M.D.*, 18 F.3d 1132, 1143-44 (4th Cir. 1994), explained the principle:

> Reports specifically prepared for purposes of litigation are not, by definition, "of a type

> reasonably relied upon by experts in the particular field."

The Eighth Circuit Court of Appeals in *United States v. Greybear*, 883 F.2d 1382, 1392-93 (1989), recognized this principle when it held:

> [Appellants] first contend that the district court erred in failing to permit their expert witness, Dr. Jerry Baldwin, to state that the opinions of two other pathologists agreed with his own. We are persuaded that Fed.R.Evid. 703 does not permit an expert witness to circumvent the rules of hearsay by testifying that other experts, not present in the courtroom, corroborate his views.

The Seventh Circuit Court of Appeals upheld the same principle in *James Wilson Associates, Debtor*, 965 F.2d 160, 173 (1992) (citing *Greybear*), when it explained that a testifying architect could not "becom[e] in short the [nontestifying] engineer's spokesman" and then disallowed "the kind of hand-off attempted in this case." *Accord: Linn v. Fossum*, 946 So.2d 1032, 1038-1039 (Fla. 2007) (applying state rule identical to FRE 703) ("[If] the sources are an expert witness's colleagues who have responded to a case-specific inquiry by the expert...[t]he opposing party is unable to cross-examine the nontestifying experts...").

Further, under Rule 703, the fact that Koppatschek relied on Ojala's inadmissible hearsay report does not transform the report into substantive evidence. *Boone v.* Moore, 980 F.2d 539, 542 (8th Cir. 1992) ("unless the particular evidence is otherwise admissible under the

Rules of Evidence, it may not come in as substantive evidence."); *Barrett v. Acevedo*, 169 F.3d 1155, 1163, n. 7 (8th Cir. 1999) ("This type of evidence is never admitted for the truth of the matter asserted, but simply to show a basis for an expert's opinion.") (citing *Boone*); *United States v. Tran Trong Cuong, M.D.*, 18 F.3d 1132, 1143-44 (4th Cir. 1994) ("Even though an expert witness may base his opinion on underlying information, it does not follow that the otherwise inadmissible information may come into evidence just because it has been used by the expert in reaching his opinion.")

An expert is not permitted to render an opinion based exclusively upon inadmissible facts or data, and such an opinion does not create a fact issue. *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732 (10th Cir. 1993) ("The fact that [the expert] relied upon the [inadmissible] report in performing his calculation of lost profits did not relieve the plaintiffs from their burden of proving the underlying assumptions contained in the report."); *In re Lake State Commodities, Inc.*, 271 B.R. 575, 584-585, 587 (N.D. Ill. 2002) (no fact question generated on Ponsi Scheme issue when only evidence was expert who relied solely on opinion of nontestifying expert). Monsanto admitted Ojala's test conclusions were "crucial" to proof of its infringement claim. (¶ 13, *supra*, p. 6-7)

None of the cases cited by the Panel in its opinion involved an expert testifying to the results of tests performed for the purposes of the litigation by another of the same party's paid but nontestifying expert. *See* 516 F.3d at 1015; App. 11a. In *Data Line Corp. v. Micro Techs., Inc.*, 813 F.2d 1196, 1200-1201 (Fed. Cir.

1987), the plaintiff's experts testified about schematic drawings of the patented device "from various sources" that were pre-litigation and did not testify on the basis of reports or drawings prepared for purposes of litigation by the same party's nontestifying expert. *Sweet v. United States*, 687 F.2d 246, 249-250 (8th Cir. 1982), dealt with challenges to expert *qualifications*; neither of the challenged government psychiatric expert witnesses testified on the basis of any test or report prepared for the purposes of litigation by a nontestifying expert. In *Ratliff v. Schiber Truck Co.*, 150 F.3d 949, 952-953, 955 (8th Cir. 1998), the plaintiff's expert admitted on direct he relied in part on a police report and the court merely upheld a ruling allowing defendant's attorney to *cross-examine* the plaintiff's expert on report conclusions adverse to the plaintiff. In *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 94-95 (2nd Cir. 2000), the plaintiff's expert testified on the basis of tests performed by the defendant's *own* experts and pre-litigation tests performed by the state environmental agency in its regulatory capacity. None of the Panel's cases admitted testimony given by a party's paid expert in "reliance on ... scientific reports prepared by his team ... ", the tactic approved by the Federal Circuit.

Without testifying expert Koppatschek's regurgitation of nontestifying expert Ojala's DNA sequence test report conclusion, Monsanto had no evidence of how much RR seed was allegedly planted in Petitioner's fields, so Monsanto's circumstantial evidence case fails for lack of a "crucial" element. It is important for the Supreme Court to give the circuit courts of appeal and district courts guidance on the correct application of FRE 803(6) and 703 to testimony

of an expert retained for purposes of litigation that reiterates a report prepared for purposes of the litigation by another nontestifying retained expert.

III. This Court Should Review Whether a Federal Statutory Award of Attorney Fees, Expert Expenses, and Costs in a Private Law Action (Not a Civil Rights Action Involving Important Civil and Constitutional Rights Providing a Broader, Uncompensated Benefit to the Public), in the Amount of $487,000, Is Reasonable in Relation to the Result Achieved, a Compensatory Damage Award of $226,000.

A. The question is important.

Once again the Federal Circuit's denial of rehearing *en banc* makes its decision on this issue its entrenched position. And also once again, the Federal Circuit's decision is in conflict with Supreme Court precedent. *City of Riverside v. Rivera*, 477 U.S. 561, 574-575, 578, 585-587, 591-593 (1983); *Farrar v. Hobby*, 506 U.S. 103, 114-116 (1992). This is a trigger factor for certiorari review of a Federal Circuit decision. *Supreme Court Practice*, at 287, *supra*, p. 2. Since the Federal Circuit Panel acknowledged that Petitioner asserted this appeal point (516 F.3d at 1016; App. 13a), but without explanation *failed to address it*, Supreme Court precedent on this issue apparently was not clear to the Panel or the Circuit *en banc*. Clarifying Supreme Court precedent on this issue is also a basis for granting certiorari. (*Supra*, p. 10)

It is important that the Supreme Court resolve this question because it resonates far beyond fee awards in patent cases. Resolution of this question here will instruct all federal district and circuit courts on correct application of all non-civil rights statutes authorizing fee awards.

In addition, the decision of the Federal Circuit (which has exclusive jurisdiction of all patent claims, except counterclaims) conflicts with decisions of the Fourth and Fifth Circuits.

B. The Federal Circuit decided the question incorrectly.

The Federal Circuit Panel ruled that the District Court's $226,000 compensatory damage award was clearly erroneous because the planting rate assumed by the District Court was too great, and remanded for reduction of the award. Monsanto claimed only damages for a *one year license* to David to plant saved seed during 2003. It never pleaded or charged David transferred saved seed to another person. The Federal Circuit Panel nevertheless awarded a hypothetical negotiated royalty of $55.04 per unit for the 4,110 units the District Court found Petitioner planted unlawfully.

The Panel's opinion acknowledged that Petitioner's third challenge to the fees and costs awarded was that the amount awarded "does not bear a reasonable relation to the results achieved..." 516 F.3d at 1016; App. 13a. Not only did the Panel fail to address the cases Petitioner cited in support of David's challenge, the Panel failed to address the issue at all.

Other circuit courts of appeal have recognized that in private law actions the amount of an attorney fee award must be reasonable in comparison to the amount of the damage award. In *Thomas v. Peacock*, 39 F.3d 493, 506 (4th Cir. 1994) (remanded for recalculation of damages), the court contrasted fee awards in civil rights cases where fee shifting statutes are intended to provide an incentive for "private attorneys general" to enforce the statute, with private law actions such as ERISA actions (and here patent infringement actions) in which there is no statutory purpose of creating "private attorneys general." *Accord*: *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1265-66 (5th Cir. 1980) (plaintiffs in civil rights actions are "private attorneys general", but that purpose does not carry over to private law actions); and *see*, *McNeil-PPC, Inc. v. L. Perrigo Company*, 337 F.3d 1362, 1372 (Fed. Cir. 2003) ("...[a]ttorney fees are not to be routinely assessed against a losing party in litigation in order to avoid penalizing a party 'for merely defending or prosecuting a lawsuit.'").

The Federal Circuit's position conflicts with *City of Riverside v. Rivera*, 477 U.S. 561, 574-575, 578, 585-587, 591-593 (1986). In *Riverside*, Justice Brennan's plurality opinion (three justices joined in the opinion, and Justice Powell concurred only in the judgment), in discussing reasonable fee factors in a civil rights case, said "The amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under § 1988." 477 U.S. at 574. The opinion pointed out, however, that this was only one factor in civil rights cases because "Unlike most private tort litigants, a civil rights plaintiff seeks to

vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Id.*

The *Riverside* plurality opinion by Justice Brennan explained at 477 U.S. 575:

> Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief.
>
> ****
>
> Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages.

At 477 U.S. 578, the plurality continued its explanation of why proportionality between statutory fees and monetary damages recovered was not always desirable in civil rights cases:

> A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988.

Justice Powell's concurring (in the judgment only) opinion also recognized the importance of a reasonable relation between fees awarded and the amount recovered where the "recovery of private damages is

the purpose" of the case rather than "the vindication of constitutional rights in addition to the amount of damages recovered." 477 U.S. at 585. Thus all five Justices forming the *Riverside* majority endorsed the proportionality principle where public benefits are not sought.

Four justices dissented in *Riverside* because they believed the case did *not* achieve such non-monetary constitutional public benefits and therefore should be judged as if it was a private law action. Justice Rehnquist's dissent said:

> In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority. 461 U.S. at 434, 103 S.Ct. at 1940, quoting *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original).

Justice Rehnquist's dissent explained at 477 U.S. 593:

> If A has a claim for contract damages in the amount of $10,000 against B, and retains an attorney to prosecute the claim, it would be both extraordinary and unjustifiable, in the absence of any special arrangement, for the attorney to put in 200 hours on the case and send the client a bill for $25,000. Such a bill would be "unreasonable," regardless of whether A obtained a judgment against B for $10,000 or obtained a take-nothing judgment...any

> competent attorney, whether prosecuting or defending a contract action for $10,000, would realize that the case simply cannot justify a fee in excess of the potential recovery on the part of either the plaintiff's or the defendant's attorney.... The very "reasonableness" of the hours expended on a case by a plaintiff's attorney necessarily will depend, to a large extent, on the amount that may reasonably be expected to be recovered if the plaintiff prevails.

Thus all nine justices in *Riverside* supported the principle that in a private law action, any award of fees and costs must be reasonable in relation to the monetary damages obtained. *Accord: Farrar v.* Hobby, 506 U.S. 103, 114-116 (1992); *Silverman v. CBS, Inc.*, 675 F.Supp. 870, 871 (S.D.N.Y. 1988), *affirmed in part, vacated in part* (fee reduction affirmed) 870 F.2d 40 (2nd Cir. 1989), *cert. denied,* 492 U.S. 907 (1989) (copyright case, $185,887 in fees requested on $9,403 recovery, $10,000 fee award); *Bemis v. Hogue*, 935 F.2d 269, 1991 WL 102385, p. 6 (6th Cir. 1991) ($17,425 fee request, $2,500 awarded); *In re South Dakota Microsoft Antitrust Litigation*, 707 N.W.2d 85, 108 (S.D. 2005) (fee award of $2,064,000 "has no reasonable relation to the $466,000" recovery).

Any question after *Riverside* about whether statutory attorney fees must be reasonably related to the money damages recovered, where no broader public benefit is achieved, should have been put to rest in *Farrar v. Hobby*, 506 U.S. 103 (1992). In *Farrar*, plaintiff's suit obtained a jury verdict that plaintiff had been deprived of a civil right but plaintiff was awarded only nominal damages. 506 U.S. at 106-107. The

district court nevertheless awarded attorney fees and expenses of $307,000. The Fifth Circuit reversed the fee award and denied award of any fees because there was only "a nominal award of one dollar ... nor was the result a success for the [plaintiff] on a 'significant issue ...'" *Estate of Farrar v. Cain*, 941 F.2d 1311, 1315 (5th Cir. 1991). In affirming the Fifth Circuit's denial of fees, Justice Thomas' majority opinion in *Farrar v. Hobby*, said:

> Where recovery of private damages is the purpose of ... civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Riverside v. Rivera*, 477 U.S. 561, 585, 106 S.Ct. 2686, 2700, 91 L.Ed.2d 466 (1986) (Powell, J. concurring in judgment). Such a comparison promotes the court's "central" responsibility to "make the assessment of what is a reasonable fee under the circumstances of the case." *Blanchard v. Bergeron*, 489 U.S. 87, 96, 109 S.Ct. 939, 946, 103 L.Ed2d 67 (1989).

506 U.S. at 114-115.[3] The Supreme Court criticized the district court at 506 U.S. 115-116:

> In an apparent failure to heed our admonition that fee awards under § 1988 were never intended to "'produce windfalls to attorneys,'" *Riverside v. Rivera*, *supra*, 477 U.S., at 580, 106

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[3] Justice O'Connor's concurrence joined in Justice Thomas' opinion and concurred in the judgment. 506 U.S. at 116.

> S.Ct. at 2697 (plurality opinion) (quoting S.Rep. No. 94-1011, p. 6 (1976) U.S. Code Cong. & Admin. News 1976 pp. 5908, 5913), the District Court awarded $280,000 in attorney's fees without "consider[ing] the relationship between the extent of success and the amount of the fee award." *Hensley, supra*, 461 U.S., at 438, 103 S.Ct., at 1941.

Thus, in a civil rights case which does not achieve a significant public benefit in addition to monetary damages a statutory award of attorney fees must be reasonably related to the monetary award obtained. The same reasonable relationship is clearly required in a private patent action benefitting only Monsanto.

The Panel further erred when it said, "...we reject David's argument that the attorney fees and costs stipulated to in the Technology Agreement are limited by statute."[4] (App. ____) Again, the Panel's opinion did not address David's cases. When the finding of a breach of contract depends upon whether a patent was infringed, 35 U.S.C.A. § 285 governs the extent to which the district court may award attorney fees. *Interspiro U.S.A., Inc. v. Figgie International, Inc.* 18 F.3d 927, 933 (Fed. Cir. 1994). Monsanto's claimed contract breach is that David infringed the '605 Patent. Therefore 35 U.S.C.A. § 285 and 28 U.S.C.A. §§ 1920 and 1821 (b) govern the extent of any award of attorney fees and costs. This is a specific remedy

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[4] The back page of the Technology Agreement states, "These Monsanto gene technologies are protected under U.S. patent law...." (A45-46)

allowed by Title 35 and the remedy cannot be enlarged by a contract between private parties. The court in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-224 (1986), instructed:

> Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-308, 55 S.Ct. 407, 415-16, 79 L.Ed. 885 (1935).
>
> If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions.

Accord: B & G Enterprises, LTD. v. United States, 220 F.3d 1318, 1323 (Fed. Cir. 2000) (quoting *Connolly*); *United States v. Blue Cross / Blue Shield of Alabama*, 999 F.2d 1542, 1547 (11th Cir. 1993) (quoting *Connolly*).

Existing statutory provisions are as much a part of a contract as if they had been included in the contract. *Norfolk & Western Railway Co. v. American Train Dispatchers' Assn.*, 499 U.S. 117, 129-130 (1991); *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.* 254 F.3d 706, 713 (8th Cir. 2001). Monsanto accepted Title 35 benefits of the '605 patent. Monsanto cannot use a private contract to avoid the limitations imposed by Title 35 and Title 28 on the

remedies Congress has specifically allowed and limited.

Monsanto would not incur these extraordinary attorney fees and expenses unless it thought that by using Petitioner as an example of what Monsanto can do to a farmer, Monsanto could increase revenues enough to justify these excessive expenditures. Petitioner is not obligated by § 285 to finance the cost of Monsanto's business plan.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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August 12, 2008

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2007-1104

[Filed February 5, 2008]

MONSANTO COMPANY,
Plaintiff-Appellee,

and

MONSANTO TECHNOLOGY LLC,
Plaintiff-Appellee,

v.

LOREN DAVID,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Missouri in case no. 4:04-CV-425, Judge Henry E. Autrey.

Before LOURIE, BRYSON, and MOORE, *Circuit Judges*.

LOURIE, *Circuit Judge*.

Loren David appeals from the final judgment of the United States District Court for the Eastern District of Missouri. On April 20, 2006, the court held that David knowingly infringed U.S. Patent 5,352,605 (the "'605 patent"), and awarded Monsanto Company and Monsanto Technology LLC (collectively "Monsanto") compensatory damages in the amount of $226,214.00. *Monsanto Co. v. David*, 448 F. Supp. 2d 1088, 1094 (E.D. Mo. 2006). On July 25, 2006, the court awarded Monsanto attorney fees, prejudgment interest, and costs, bringing the total damages award to $786,989.43. *Monsanto Co. v. David*, 448 F. Supp. 2d 1095, 1102-03 (E.D. Mo. 2006). Because we hold that the district court correctly held that the '605 patent was infringed, but find that portions of the damages award were clearly erroneous, we affirm in part, vacate in part, and remand.

BACKGROUND

One of the many products that Monsanto sells is Roundup® brand herbicide. Glyphosate-based herbicides, such as Roundup®, kill vegetation by inhibiting the metabolic activity of a particular enzyme, common in plants, that is necessary for the conversion of sugars into amino acids. Herbicides that have glyphosate as the active ingredient are non-selective; that is, they kill all types of plants whether the plant is a weed or a crop.

In addition to developing and selling herbicides, Monsanto sells other products made using biotechnology. Monsanto has developed Roundup Ready® Technology, which involves inserting a chimeric gene into a seed that allows the plant to

advantageously continue to break down sugars in the presence of glyphosate. Crops grown from such seeds are resistant to Roundup® and other glyphosate-based herbicides. When Roundup Ready® seeds are planted and used in conjunction with a glyphosate-based herbicide, Roundup Ready® plants will survive, while weeds and other plants lacking the Roundup Ready® gene will be killed. Monsanto has claimed this technology in the '605 patent.

Roundup Ready® genes have been introduced into numerous agricultural products, including soybeans, the subject of the present case. Monsanto licenses seed companies to incorporate the Roundup Ready® genes into their plants and to sell soybean seeds containing the Roundup Ready® gene. All purchasers of such seeds are required to enter into a Technology Agreement that grants them the right to use the seeds. The Technology Agreement stipulates that buyers may use the seeds for the planting of only a single commercial crop, but that no seeds from that crop may be saved for future harvests. The Technology Agreement assures Monsanto that farmers must purchase new Roundup Ready® seeds each harvesting season, rather than simply saving seeds from the prior year's harvest, as they normally would with conventional soybean seeds. Monsanto also charges a Technology Fee for each unit of Roundup Ready® soybean seeds sold.[1] The Technology Agreement also contains a clause granting Monsanto the full amount

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[1] The Technology Fee for soybean seeds in 2003 was $7.75 per unit.

of its legal fees and other costs that may have to be expended in enforcing the agreement.

David is a commercial farmer who owns soybean fields in North and South Dakota. On May 3, 1999, David executed a Monsanto Technology Agreement. In 2003, David planted the contested soybeans at issue in this case.[2] Monsanto claims that the seeds that David planted were Roundup Ready® soybeans improperly saved from the previous year's harvest, but David claims he did not save any Roundup Ready® seed. It is undisputed that, prior to planting his soybean fields in 2003, David purchased 645 units[3] of Roundup Ready® soybean seeds and it is also undisputed that that amount of seeds alone would have been insufficient to completely plant David's soybean fields in 2003. Also undisputed is the fact that David purchased over 1,000 gallons of glyphosate-based herbicides in 2003, herbicide that would destroy any plants that did not contain the Roundup Ready® gene, and would therefore have destroyed any conventional soybean seeds David planted.

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[2] The 1999 Monsanto Technology Agreement states "this agreement remains in effect until you or Monsanto choose to terminate the Agreement." Neither party in this appeal contends that the 1999 Agreement was not in effect when David planted his fields in 2003.

[3] Roundup Ready® soybeans are typically sold in fifty-pound units, while conventional seeds typically are sold in sixty-pound bushels.

At some time in 2003, Monsanto began to suspect that David had saved soybean seed from his previous year's harvest in violation of the Technology Agreement. In April 2004, after David's 2003 crop had already been harvested and sold, Monsanto obtained samples of the soybean plant material remaining from some of David's fields. On the basis of those tests, on April 12, 2004, Monsanto filed suit for patent infringement, breach of contract, unjust enrichment, and conversion, alleging that David had illicitly saved and planted Roundup Ready® seeds.

A bench trial was held in February 2006 during which Monsanto presented crop insurance records with planting dates provided by David. In those records, David claimed to have planted nearly all of his soybean fields as of May 6, 2003. Monsanto also presented an invoice from Red River Grain for David's purchase of 993 units of Roundup Ready® soybean seed on May 31, 2003, nearly a month after David claimed to have planted the vast majority of his soybean crop for the year. Monsanto argued that that purchase was merely David's attempt to convince Monsanto that he had purchased enough Roundup Ready® seed to plant his crops and that he had not saved any seed.

On April 20, 2006, the district court entered judgment against David. The court found David's claim that he purchased and planted the seeds from Red River Grain more than a month before the date of the invoice to be "unreliable." *David*, 448 F. Supp. 2d at 1091. Furthermore, the court found David's testimony regarding his claimed purchase of conventional herbicides "not believable." *Id.* The court

found David to be unreliable as a witness, and also found that he had failed to overcome the scientific evidence showing that he had planted his soybean fields exclusively with Roundup Ready® seeds, yet he had not purchased sufficient quantities of such seed in 2003 to do so. The court, therefore, held that David had willfully infringed the '605 patent and breached the Technology Agreement by planting saved seed from a prior year's crop. A damages award of $226,214.40 was entered in favor of Monsanto.

After the ruling, Monsanto filed four motions: for attorney fees, prejudgment interest, costs, and treble damages. On July 25, 2006, the court awarded Monsanto an additional $10,000 in enhanced damages in lieu of treble damages, and found that Monsanto was entitled to recover attorney fees in the amount of $323,140.05. The court awarded Monsanto costs in the amount of $164,608.03 pursuant to the Technology Agreement, and, alternatively, costs in the amount of $30,542.99 pursuant to 28 U.S.C. § 1920. Lastly, the court awarded Monsanto prejudgment interest in the amount of $63,026.95. In sum, David was found liable to Monsanto for $786,989.43. David filed two motions to amend the April 20, 2006 judgment, both of which were denied by the court on October 27, 2006.

David timely appealed the district court's judgment. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

DISCUSSION

A. Infringement

The '605 patent claims a gene sequence, not a plant variety or a seed. U.S Patent No. 5,352,605 (filed Oct. 28, 1993). Therefore, David argues that the '605 patent cannot be infringed merely by saving seeds from plants containing the patented gene sequence. David argues that the written description of the '605 patent lacks the specificity that would be required of a patented plant variety under the utility patent statute; thus, the '605 patent is limited to the gene sequence and does not cover the plant containing such a gene. David argues that *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124 (2001), stands for the proposition that plants can only receive patent protection under the Plant Patent Act of 1930, 35 U.S.C. §§ 161-164 (the "P.P.A."), the Plant Variety Protection Act of 1970, 7 U.S.C. § 2321 (the "P.V.P.A."), or under a utility patent on a plant variety. A utility patent on a gene sequence, David claims, does not entitle the holder of that patent to enforce its grant of exclusivity against growers of plant varieties that contain the gene sequence.

Monsanto responds by arguing that the holding of *J.E.M.* is the opposite of what David claims it to be; the broad language of 35 U.S.C. § 101 relating to patentable subject matter remains unmodified by the existence of the P.V.P.A. and the P.P.A. Moreover, Monsanto points to various decisions of this court that have read the '605 patent onto plants and seeds containing the patented gene and holding those who save such seeds liable for infringement.

David's brief makes much of the Supreme Court's decision in *J.E.M.* *J.E.M.* involved utility patents issued for corn seed products that were held by Pioneer Hi-Bred International, Inc. The petitioner in *J.E.M.* argued that Pioneer's patents were invalid because plant varieties were only patentable under the P.P.A. or the P.V.P.A. The Supreme Court disagreed, holding that the existence of statutes specifically authorizing the patenting of plants (the P.P.A. and the P.V.P.A.) did not eliminate the availability of utility patent protection covering plants. We disagree also. Contrary to David's arguments on appeal, nothing in *J.E.M.* invalidates or limits the '605 patent or any utility patent on a gene sequence in a seed or a plant. In fact, in *J.E.M.*, the Supreme Court explicitly refused to limit the extent of patentable subject matter: "we decline to narrow the reach of § 101 where Congress has given us no indication that it intends this result." *J.E.M.*, 534 U.S. at 146-47. The '605 patent covering the gene sequence is infringed by planting a seed containing the gene sequence because the seed contains the gene. The gene itself is being used in the planting, an infringing act.

David's real complaint seems to be that he should be able to save seed from his harvest, regardless of Monsanto's patent. We have dealt with this complaint before. *See e.g. Monsanto Co. v. McFarling*, 302 F.3d 1291 (Fed. Cir. 2002). In *McFarling*, we held that a farmer who saved seed containing a patented gene was liable for patent infringement. *Id.* at 1299 (citing *J.E.M.*, 534 U.S. at 604). *McFarling* further established that "the right to save seed of plants registered under the PVPA does not impart the right to save seed of plants patented under the Patent Act."

Id. We note that *McFarling* dealt with the very patent at issue in this case—the '605 patent. We may not disregard a prior decision of this court regarding the same matter.

David next argues that the district court's finding of infringement was clearly erroneous and that there was no evidence from which to infer that he saved Roundup Ready® soybeans from his 2002 harvest for planting in 2003. Additionally, he argues that the district court's admission of expert testimony and exhibits was an abuse of discretion.

Monsanto urges this court to uphold the factual findings of the district court. Monsanto also argues that David ignores Federal Rule of Evidence 703, which allows an expert witness to base his opinion on evidence that itself may be inadmissible.

We review factual findings of the district court for clear error. *Interspiro USA, Inc. v. Figgie Int'l, Inc.*, 18 F.3d 927, 930 (Fed. Cir. 1994). Decisions concerning the admission of evidence, such as expert testimony, are reviewed for abuse of discretion. *U.S. v. Jimenez*, 487 F.3d 1140, 1145 (8th Cir. 2007); *Pietzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 296 (Fed. Cir. 1996). When reviewing the evidentiary findings of the district court, we apply the law of the circuit in which the district court sits, *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1390-91 (Fed. Cir. 2003), which in this case is the Eighth Circuit.

We agree with Monsanto that the factual findings of the district court were not clearly erroneous. David does not dispute that he planted Roundup Ready®

soybean seeds in 2003; rather, he claims that the Roundup Ready® seeds that he planted were acquired from authorized dealers. To dispute this claim, Monsanto presented scientific field tests demonstrating that David's soybean fields had been planted exclusively with Roundup Ready® soybeans, invoices proving that David had purchased large quantities of glyphosate-based herbicides, government documents of David's planting dates, and evidence that David had not purchased enough Roundup Ready® seeds to fully plant his fields by those dates. In response, David offered inconsistent testimony regarding what he actually planted in 2003. *David*, 448 F. Supp. 2d at 1092. David changed his version of events at least three times, including claiming that he planted only the perimeters of his fields with Roundup Ready® seed, while planting the interior of his fields with conventional seed. *Id.* David's testimony, and that of his daughter, was the only evidence offered to refute Monsanto's case. Due to his continually changing testimony, the court disregarded much of David's testimony. *See id.* Given David's unreliability as a witness, and a complete lack of other evidence supporting his claims, we conclude that the district court did not clearly err in determining that David planted saved seed.

David also argues that the seed report tests conducted by Monsanto and the testimony of Monsanto's expert Koppatschek, which relied on those seed report tests, were improperly admitted at trial. David further argues that had those pieces of evidence been excluded, the court would not have had sufficient evidence from which to find that David saved seed.

David's arguments to exclude Koppatschek's testimony are unpersuasive. Rule 702 of the Federal Rules of Evidence allows expert testimony if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. David does not suggest that Koppatschek's testimony is unreliably applied or based on unreliable methods or insufficient data; rather, he challenges Koppatschek's reliance on the seed report tests that were produced by Monsanto's scientific team, but not by Koppatschek personally.

David's challenge fails, however, because the Federal Rules of Evidence establish that an expert need not have obtained the basis for his opinion from personal perception. *See e.g.*, *Sweet v. United States*, 687 F.2d 246, 249 (8th Cir. 1982); *Data Line Corp. v. Micro Techs., Inc.*, 813 F.2d 1196, 1200-01 (Fed. Cir. 1987). Likewise, numerous courts have held that reliance on scientific test results prepared by others may constitute the type of evidence that is reasonably relied upon by experts for purposes of Rule of Evidence 703. *See e.g.*, *Ratliff v. Schiber Truck Co.*, 150 F.3d 949, 955 (8th Cir. 1998) (holding that expert testimony regarding a report prepared by a third party was properly allowed); *see also Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 94, 95 (2d Cir. 2000) (finding that testimony was properly admitted from an expert who did not conduct his own tests). "Unlike an ordinary witness, *see* Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on first hand knowledge." *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 592 (1993).

Koppatschek's reliance on the scientific reports prepared by his team is therefore the type of reliance that is reasonable for expert witnesses. Furthermore, Koppatschek's testimony is admissible, regardless of the admissibility of the seed report.[4] Rule 703 expressly authorizes the admission of expert opinion that is based on "facts or data" that themselves are inadmissible, as long as the evidence relied upon is "of a type reasonably relied upon by experts in the particular field in forming opinions." Fed. R. Evid. 703. The tests conducted in this case are certainly of the type relied upon by experts, and Koppatschek's testimony was therefore admissible.

B. Damages

David also appeals the district court's damages calculation. The district court awarded Monsanto a reasonable royalty for David's infringing use of the '605 patent, enhanced damages, attorney fees, costs, and prejudgment interest. David challenges the attorney fees and cost awards, as well as the reasonable royalty, but does not challenge the enhanced damages or prejudgment interest. We review the district court's damages decision for an "erroneous conclusion of law, clearly erroneous factual findings, or a clear error of judgment amounting to an abuse of

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[4] We need not decide whether the seed report itself was admissible, nor does it appear that David makes this argument on appeal. Even assuming, *arguendo*, that it was improperly admitted, in this case it is cumulative and does not appear to have had any prejudicial effect; it was therefore harmless error. *See ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 550 (Fed. Cir. 1998).

discretion." *Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1338 (Fed. Cir. 2004) (citing *Grain Processing Corp. v. Am. Maize-Prods. Co.*, 185 F.3d 1341, 1349 (Fed. Cir. 1999).

1. Attorney Fees and Costs

On appeal, David makes four arguments for reducing or eliminating the district court's award of attorney fees and costs. First, he argues that this is not an exceptional case as required for the award of attorney fees under 35 U.S.C. § 285. Second, he argues that the attorney fee provision in the Technology Agreement is unenforceable because that provision appears on the reverse side of the agreement, while the signature page is on the front. Third, David claims that the amount of the attorney fee award ($323,140.05) does not bear a reasonable relation to the result achieved as required under *Perricone v. Medicis Pharmaceutical Corp.*, 432 F.3d 1368 (Fed. Cir. 2005). And fourth, David urges this court to limit the amount of attorney fees awarded under the Technology Agreement to an amount that would be recoverable under 35 U.S.C. § 285 and 28 U.S.C. §§ 1920, 1821(b).

In reply, Monsanto maintains that the district court had ample reason to conclude that David's case was "exceptional." According to Monsanto, David's "deceitful" litigation tactics prolonged Monsanto's case and increased its fees and costs, and the district court was within its discretion to award additional fees to Monsanto. Furthermore, Monsanto argues that David's legal arguments limiting the attorney fees and costs are without merit.

We review a finding that a case is "exceptional" for clear error. *Perricone*, 432 F.3d at 1380. We review an award of attorney fees in an exceptional case for abuse of discretion. *Id.*

We agree with Monsanto that the district court's decision to award attorney fees was not an abuse of discretion. David knew that saving seed was a violation of the Technology Agreement, yet he did so anyway. *David*, 448 F. Supp. 2d at 1099. He attempted to cover up his infringement and deceive Monsanto. *Id.* This is not a case of a farmer unknowingly infringing a patent. It is a case of a farmer with apparent disregard for patent rights, license agreements, and the judicial process. With that in mind, as well as the record evidence of David's inconsistent testimony, we agree with the district court that this is an "exceptional" case under *Perricone*, and we find that the awarding of attorney fees was within the discretion of the district court.

David's argument that the contractual provision is invalid also fails. We have decided this same issue—whether contractual provisions appearing on the back of a contract are enforceable—in a case involving a nearly identical Technology Agreement. In *McFarling*, we held that, absent a showing of fraud, a "party who signs an agreement is bound by its terms." *McFarling*, 302 F.3d at 1295-96. We see no reason to deviate from that ruling here, and David has not claimed that his signing of the Technology Agreement was fraudulently procured.

Lastly, we reject David's argument that the attorney fees and costs stipulated to in the Technology

Agreement are limited by statute. David urges this court to limit attorney fees to those recoverable under 35 U.S.C. § 285. He also urges us to limit the award of costs to the amount available under 28 U.S.C. § 1920. David's use of 35 U.S.C. § 285 in this case, however, is inapposite. That statute awards attorney fees to patent holders like Monsanto, but the Technology Agreement here also does. Having violated the Technology Agreement, there is no reason why its attorney fee provision cannot be enforced.

Similarly, 28 U.S.C. § 1920 does not set maximum costs around which private parties may not contract. *See e.g.*, *TCBY Sys., Inc. v. RSP Co.*, 33 F.3d 925 (8th Cir. 1994). That statute limits the amount that federal courts may tax as costs in the absence of "explicit statutory or *contractual authorization* to the contrary." *U.S. v. Mink*, 476 F.3d 558, 564 (8th Cir. 2007) (emphasis added) (quoting *U.S. v. Hillard*, 909 F.2d 1114, 1142 (8th Cir. 1990)). Having held that David breached the Technology Agreement, there is no reason that the amount of contractual costs authorized therein should be limited by § 1920. Thus, the costs agreed to in the Technology Agreement are enforceable, even though those costs exceed the costs recoverable under § 1920.

The district court awarded Monsanto the full amount of its requested costs pursuant to the Technology Agreement; $164,608.03. The district court alternatively awarded Monsanto costs of $30,542.99, the amount requested under 28 U.S.C. § 1920. Those costs appear to be duplicative of the Technology Agreement costs award granted to Monsanto and therefore are not recoverable in light of our affirmance

of the Technology Agreement costs award. There is no basis for a double assessment of costs.

We therefore affirm the district court's award to Monsanto of $10,000 in enhanced damages, $164,608.03 in costs, and $323,140.05 in attorney fees.

2. Reasonable Royalty

David next argues for a reduction of the district court's infringement damages award. David argues that the number of infringing units of seed that the district court found he had planted (4,110 units) was not supported by the evidence. He also claims that the reasonable royalty awarded for each unit ($55.04) was not supported by the evidence, that the court's adoption of that figure was a violation of the doctrine of collateral estoppel, and that the court should have used the $7.75 Technology Fee as the reasonable royalty figure.

Monsanto counters that the number of infringing seed units planted by David was correctly calculated by the district court, and that the district court properly relied on expert testimony in arriving at the 4,110 unit figure. Monsanto also notes that the royalty for each unit of seed is the same as that upheld in *Monsanto Co. v. McFarling*, 488 F.3d 973 (Fed. Cir. 2007), cert. denied, 2008 WL 59323 (Jan. 7, 2008) ("*McFarling III*"), and *Monsanto Co. v. Ralph*, 382 F.3d 1374 (Fed. Cir. 2004), and should thus be upheld here as well.

At trial, Monsanto's expert testified that after applying the multi-factor *Georgia Pacific* test he

calculated a reasonable royalty for David's infringement at $66 per bag. The district court, however, relying on this court's decision in *Ralph*, awarded a $55.04 royalty instead. *David*, 448 F. Supp. 2d at 1093; *see Ralph* 382 F.3d at 1383. David's argument that the court should have adopted the technology fee paid on each purchase of Roundup Ready® soybean has come before this court previously in both *Ralph* and *McFarling III*. As in those cases, we reject the argument here. *Ralph* held that the Technology Fee is "not an established royalty for planting . . . saved seed." *Ralph*, 382 F.3d at 1384. David argues that his case is distinguishable from *Ralph* due to the fact that there is no evidence that David, unlike Ralph, transferred seed to others. Regardless of any perceived difference in the relative levels of culpability between David and Ralph, our decision in *Ralph* stands for the fact that the Technology Fee is not an established royalty for the infringing act of saving seed. As for the specifics of this case, the district court was within its discretion to rely on the only reasonable testimony presented to it, that of Monsanto's expert. Furthermore, we do not see how the court's reduction of the royalty from $66.00 to $55.04 implicates the doctrine of collateral estoppel. We therefore uphold the district court's finding of a royalty of $55.04 per unit.

In calculating the number of infringing seed units planted by David, the district court had the difficult task of determining the total soybean acreage planted by David in 2003 and the density of seed used in those

fields.[5] David does not challenge the district court's finding that he planted a total of 2,222 acres in 2003. He does, however, challenge the district court's finding of an average planting density of 107.5 pounds per acre. To arrive at that figure, the district court averaged two density figures offered at trial; Monsanto's expert Koppatschek established a planting rate of 95 pounds per acre, based on samples taken from David's fields, and David offered a high estimate of 120 pounds per acre during a deposition taken on November 9, 2004. David argues that the density calculated by the district court was not supported by the evidence and furthermore that the evidence supports a much lower figure.

Monsanto counters that the density calculation is supported both by expert testimony and David's own testimony at deposition. Monsanto claims that the testimony David cites as supporting a lower density figure was based on merely hypothetical discussions of soybean farming generally, and not related to the specifics of David's actions in 2003.

On this point, we agree with David that the density calculation was clearly erroneous. In so concluding, we appreciate the difficulty faced by the district court in

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[5] The district court multiplied David's soybean acreage by the planting density to obtain the total weight of soybean seeds planted. The court then divided that total by fifty pounds to obtain the total number of soybean units planted. Subtracting the 645 units legitimately purchased before planting, the court obtained the total infringing units. Multiplying that number by the reasonable royalty ($55.04/bag), the court obtained the final damage figure.

arriving at a density figure in this case. In arguing for reduction of the density calculation, David's appellate brief lists at least four different rates at which he claimed to have planted soybeans, ranging from three-quarters of a unit (37.5 pounds) to one and one-half units (75 pounds). The record demonstrates that much of this confusion stemmed from the different planting rates used for conventional soybean seeds and Roundup Ready® seeds, due both to the better yield and the higher price of the Roundup products. The confusion, certainly, also stemmed from David's unreliability, as noted by the district court and as evidenced throughout the record.

However, David's estimate of 120 pounds per acre, when properly read in context, did not refer to the density of his Roundup Ready® planting. In the testimony at issue, there was some confusion between David and the questioning attorney as to the type of seed being referred to. In fact, immediately following David's response there was a discussion between Monsanto's attorney and David's attorney as to which type of seed was being referenced. Directly following this exchange, Monsanto's attorney rephrased his question and directly referenced Roundup Ready® seed. David answered that the density "could be like a unit," or fifty pounds. In all of David's extensive previous testimony, he testified that the upper limit for his planting of Roundup Ready® seed never exceeded one and one-half units (seventy-five pounds). The 120 pound density figure David offered clearly was not based on Roundup Ready seed, but rather conventional seed. The use of this anomalous 120 pound figure, in a confused context, amounted to clear error.

We thus remand to the district court for additional fact finding concerning the Roundup Ready® soybean density in David's fields in 2003. We note that there was testimony on the record in which David directly addressed his Roundup Ready® soybean planting rate; this testimony varied widely, but seems to have ranged from three-quarters of a unit (37.5 pounds) to one and one-half units (75 pounds). Use of any of those figures, which are explicitly directed to the density of Roundup Ready® soybeans, would be appropriate. Additionally, we find that, although the court's use of David's estimate of 120 pounds per acre was clearly erroneous, the court's use of the 95 pounds per acre figure arrived at by Monsanto's expert, Koppatschek, was not. Should the court decide that David's testimony on this issue was so unreliable as to be without value, the court would be well within its discretion to adopt the figure obtained by Koppatschek. The district court should make this determination, however, not this court, following which the reasonable royalty calculation outlined in footnote 5 should be followed.[6]

CONCLUSION

Accordingly, we affirm the district court's finding of infringement of the '605 patent, the court's award of attorney fees, costs, enhanced damages, and prejudgment interest, and the court's reasonable royalty calculation of $55.04 per unit. We vacate the district court's calculation of seed density of 107.5

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[6] In light of our adjustment of the total damages awarded, the district court should adjust the amount of prejudgment interest accordingly.

pounds per acre. The case is remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, and REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:04CV425 HEA

[Filed October 27, 2006]

MONSANTO COMPANY and MONSANTO TECHNOLOGY LLC Plaintiffs,	)
vs.	)
LOREN DAVID, Defendant.	)

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on defendant's Rule 59 Motion to Take Additional Evidence and Make New Findings of Fact and Conclusions of Law, [Doc. No. 258] and defendant's Amended and Supplemental Rule 59 Motion to Take Additional Evidence and Make New Findings of Fact and Conclusions of Law, [Doc. No. 260]. Plaintiffs oppose these motions. For the reasons set forth below, the Motions are denied.

In his initial motion, defendant asks the Court to reconsider its ruling of October 19, 2005, in which the Court denied defendant's motion for permission to take the depositions of Douglas Miller and Russell Rasmussen for use at trial. He also asks the Court to change the September 14, 2006 Order and the Judgment in which the Court awarded plaintiffs' costs under 28 U.S.C. § 1920 and pursuant to the Contract between the parties. In the supplemental Motion, defendant asks the Court to reconsider its denial of his motion for permission to take the deposition of Chad Friese for use at trial and the Order granting plaintiffs' Motion to Exclude Testimony at Trial from Chad Friese, Douglas Miller and Russell Rasmussen.

In support of these motions, defendant does not argue that the Court made a mistake as to law or fact, rather, defendant argues that now that the Court has heard the evidence at trial, it is in a better position to see the importance of the testimony of these individuals. He urges reconsideration based on what he believes to be significant testimony which was excluded because of the failure to disclose these individuals through the discovery process in this case. He claims that allowing the reopening of testimony to allow the taking of depositions will result in preventing manifest injustice.

District courts enjoy broad discretion in ruling on such motions. *See Concordia College Corp. v. W.R. Grace & Co.*, 999 F.2d 326, 330 (8th Cir.1993). Rule 59(e) states that "[a]ny motion to alter or amend a judgment shall be filed no more than 10 days after the entry of the judgment." Fed.R.Civ.P. 59(e). The Eighth Circuit has explained that Rule 59(e) "was adopted to

clarify a district court's power to correct its own mistakes in the time period immediately following entry of judgment." *Innovative Home Health Care v. P.T.--O. T. Assoc. of the Black Hills,* 141 F.3d 1284, 1286 (8th Cir. 1998)(quoting *Norman v. Arkansas Dep't of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996)). Motions under Rule 59(e) serve the limited function of correcting "'manifest errors of law or fact or to present newly discovered evidence.'" *Id.* (quoting *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988)). "Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." *Id.* Rule 59(e) motions are not proper vehicles for raising new arguments or legal theories. *Capitol Indemnity Corp. v. Russellville Steel Co., Inc.*, 367 F.3d 831, 834 (8th Cir.2004). Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence. *Id.* (citations and quotations omitted).

In this case, defendant, not so curiously, disagrees with the Court's rulings regarding whether to allow testimony from persons not identified in discovery. The Court has reviewed the pleadings, the record and these rulings and finds no manifest errors of law or fact which would justify granting a Rule 59(e) motion to amend or alter its prior judgment. Defendant simply points, without real authority, to what *he* believes should have been allowed by way of testimony. Without even addressing the issue of whether the testimony would have been admitted under the rules of evidence, the Court has already considered the request to allow the testimony and has denied the

requests. The Court finds no manifest errors of law or fact in its decisions. Thus, there is no reason for amending the judgment in this case.

Defendant's motion to alter the judgment with regard to the award of costs is unnecessary. In its Orders, the Court made clear that the two separate awards were alternative awards and that plaintiffs are only entitled to a single recovery of costs, whether under the terms of the parties' Contract or pursuant to 28 U.S.C. § 1920. It is abundantly clear that plaintiffs are not entitled to recover costs in excess of those actually incurred and plaintiffs are required under this Court's Orders and Judgment to make an election as to these awards.

Accordingly,

IT IS HEREBY ORDERED that defendant's Rule 59 Motion to Take Additional Evidence and Make New Findings of Fact and Conclusions of Law, [Doc. No. 258] and defendant's Amended and Supplemental Rule 59 Motion to Take Additional Evidence and Make New Findings of Fact and Conclusions of Law, [Doc. No. 260], are denied.

Dated this 27th day of October, 2006.

/s/
HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:04CV425 HEA

[Filed September 14, 2006]

MONSANTO COMPANY and MONSANTO TECHNOLOGY LLC Plaintiffs,	)
vs.	)
LOREN DAVID, Defendant.	)

JUDGMENT

In accordance with the Opinions, Memoranda and Orders entered in this matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs are awarded a reasonable royalty for defendant's knowing infringement of Monsanto's patent in the amount of $226,214.40.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs are entitled to recover its legal fees in the amount of $323,140.05.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' are awarded prejudgment interest in the amount of $63,026.95

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs are awarded enhanced damages in the amount of $10,000 additional damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs are taxed in the amount of $30,542.99, pursuant to 28 U.S.C. § 1920.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs are awarded costs and expenses pursuant to the parties' Technology Agreement in the amount of $164,608.03.

Dated this 14th day of September, 2006.

/s/
HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:04CV425 HEA

[Filed July 25, 2006]

MONSANTO COMPANY and MONSANTO TECHNOLOGY LLC Plaintiffs, vs. LOREN DAVID, Defendant.	)

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on Plaintiffs' (Monsanto) Motion for Attorneys' Fees Pursuant to 35 U.S.C. § 285, [Doc. No. 200]; defendant's Motion for Amendment of April 20, 2006 Opinion, Memorandum and Order, [Doc. No. 202]; defendant's Second Motion for Amendment of April 20, 2006 Opinion, Memorandum and Order, [Doc. No. 212]; plaintiffs' Motion for Prejudgment Interest, [Doc. No. 203]; plaintiffs' Motion for Treble Damages Pursuant to 35 U.S.C. § 284, [Doc. No. 206]; plaintiffs' Motion for Bill

of Costs, [Doc. No. 208], and defendant's Rule 59(e) Motion to Alter or Amend Award of Contract Attorneys' Fees and Costs in April 20, 2006 Opinion, Memorandum and Order, [Doc. No. 241].

Motion for Treble Damages Pursuant to 35 U.S.C. § 284

Monsanto seeks treble damages, because of the Court's finding that defendant's infringement was willful. Under 35 U.S.C. § 284, when there is willful patent infringement, the Court may "increase the damages up to three times the amount found or assessed." The parties urge the Court to make the determination of whether to assess enhanced damages in accordance with the factors set out in *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826 (Fed.Cir.1992). The parties differ, however, as to the application of those factors to this case.

In making the determination, the Court must consider "factors that render defendant's conduct more culpable, as well as factors that are mitigating or ameliorating." *Id. Read* examined a number of cases and listed nine factors that may appropriately be considered, including:

> (1) whether the infringer deliberately copied the ideas or design of another;
>
> (2) whether the infringer, when he knew of the other's patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed;

(3) the infringer's behavior as a party to the litigation;

(4) defendant's size and financial condition;

(5) closeness of the case;

(6) duration of the defendant's misconduct;

(7) remedial action by the defendant;

(8) defendant's motivation for harm; and

(9) whether defendant attempted to conceal its misconduct.

Read, 970 F.2d at 827.

Whether defendant deliberately copied the ideas or design of Monsanto

Defendant argues that this factor does not apply in this case because it is aimed at engineers or companies that employ engineers. Defendant, however, does not support this position with any authority upon which he relies. The Court is not convinced that this factor is limited to engineers and/or companies employing engineers, rather, the factor goes to the issue of whether the infringer took the patented idea and/or design of the patent holder. In this instance, it is clear that defendant "copied" Monsanto's patented design, *i.e.* the herbicide resistant soybean seeds. See, *Monsanto v. Ralph*, Cause No 4:00CV135 RWS, Transcript of Hearing, June 17, 2003. As such, this factor weighs in favor of enhanced damages.

Whether Defendant investigated the Scope of the Patent and formed a good faith belief that it was invalid or that it was not infringed

Defendant again argues that this factor is not aimed at "a North Dakota farmer." In attempting to convince the Court that this factor does not support enhanced damages, defendant urges that he never denied that he knew Roundup Ready seed was patented. This argument, however, goes to the very issue of factor two. Defendant knew that the seed was patented, he was also aware that he was forbidden from saving the seed and planting the saved seed. Knowledge and scope of the patent, at least to that extent, was known to defendant, and in saving seed, defendant knew that he was infringing.

The infringer's behavior as a party to the litigation

Throughout the course of this litigation, defendant presented various renditions of how and when he planted his fields and purchased seed and herbicides. Several "mistakes" of the dates of purchases were presented in an effort to establish that defendant did not in fact save seed. However, as the Court has previously found, these "mistakes" were not credible in light of the entire record. As such, defendant's behavior as a party to the litigation favors enhanced damages.

Defendant's size and financial condition

Monsanto argues that defendant has large amounts of land and that he received substantial subsidies from

the government in relation to that land and crop production. Further, Monsanto argues that defendant's size and financial condition cannot be adequately assessed because of defendant's failure to provide information regarding his finances.

Clearly defendant's financial condition will be substantially effected by the Court's ruling with respect to liability. Furthermore, it cannot be ignored that defendant operates his farming operation by himself, with the assistance of his family. Based on the information before the Court, the Court is persuaded, therefore that defendant's size and financial condition should **not** support a finding of enhanced damages.

Closeness of the case

After consideration of the entire record, the Court finds that this was not a "close" case. Monsanto's evidence established that defendant was infringing Monsanto's patent. Defendant's efforts in defending the case were a compilation of varying explanations attempting to "prove" he did not infringe. Monsanto presented unbiased evidence that defendant's fields were planted with Roundup Ready soybeans. Defendant consistently urged he did not, however, his explanations were not consistent. This factor supports enhanced damages.

Duration of the defendant's misconduct

Although Monsanto argues that it is clear that defendant has been infringing prior to 2003, the only evidence before the Court is what was presented and

proven at trial, *i.e.*, that the defendant's infringement was for the 2003 growing season.

Remedial action by the defendant

There is no evidence of any remedial action by the defendant. Quite the contrary, defendant's actions prior to and throughout this litigation demonstrate a that defendant took no remedial action.

Defendant's motivation for harm

The Court can only speculate that defendant's motivation for the infringement was to save money in not purchasing new seed and using saved seed. This motivation weighs in favor of enhanced damages, but there is no clear evidence to establish this in light of defendant's continued denial of wrong-doing.

Whether defendant attempted to conceal his misconduct

This factor has been established through the evidence presented by Monsanto at trial. Although defendant clearly knew he was not at liberty to save the seed, the evidence established that he in fact saved and replanted the seed, hence the Court's finding of willful infringement. Defendant presented various explanations of his actions, all clearly motivated by the attempt to conceal his infringement.

Based on the application of the *Read* factors to the evidence and record before the Court, enhanced damages are appropriate. The Court finds, however, that treble damages are not. As previously stated,

defendant will be substantially effected by the damages awarded in this matter. Furthermore, pursuant to this Court's previous orders and rulings herein, defendant will be required to pay attorneys' fees, interest and costs. Even though the Court finds that enhanced damages are appropriate for defendant's willful violation of the patent, the imposition of treble damages is too harsh a remedy. **Accordingly**, the Court awards Monsanto enhanced damages in the amount of $10,000.

Motion for Attorneys' Fees Pursuant to 35 U.S.C. § 285

The Court may also award attorneys fees in an "exceptional case." 35 U.S.C. § 285.

> The decision to award attorney fees under 35 U.S.C. § 285 in "exceptional" cases is discretionary with the trial court judge. *Beckman Instruments, Inc. v. LKB Produkter AB*, 892 F.2d 1547, 1551 (Fed.Cir.1989). "Among the types of conduct which can form a basis for finding a case exceptional are willful infringement, inequitable conduct before the P.T.O., misconduct during litigation, vexatious or unjustified litigation, and frivolous suit." *Id.* at 1551.

Amsted Industries Inc. v. Buckeye Steel Castings Co., 23 F.3d 374, 376 (Fed.Cir.1994). Again, the cases have described a two-step process for determining whether to award fees: the court must first determine whether a case is exceptional, and then the court must determine whether attorney fees are appropriate.

Cybor Corp. v. FAS Technologies, Inc., 138 F.3d 1448, 1460 (Fed.Cir.1998). See also, *Agfa Corp. v. Creo Products Inc.*, (Fed. Cir. 2006).

After considering the evidence presented and defendant's actions prior to and throughout this litigation, the Court concludes that this is an exceptional case. Monsanto's enforcement of its patent rights efforts were continuously thwarted by defendant's ever changing position as to his farming practices. Each step of Monsanto's investigation was hindered by defendant. While Monsanto is entitled to protect its patent, and required defendant to execute agreements not to infringe in exchange for the license to use its patent, Monsanto's efforts were in vain with regard to defendant. He knew he was not at liberty to save seed, yet he did so. He knew Monsanto had discovered his infringement and he proceeded to attempt to cover it up. Defendant's actions were willful in the planting of saved seed and were calculated to try to avoid liability after his infringement was discovered. Defendant has not once admitted that any of the actions taken regarding his 2003 growing season were not proper. As discussed, *supra*, this was not a close case. Defendant's different explanations of what had occurred demonstrate defendant's intent to try to deceive Monsanto as to his use of saved seed. The Court, therefore finds an award of attorneys' fees is appropriate.

The Court will reserve ruling as to the amount of fees to be awarded until such time as plaintiff responds to defendant's chronological objections to Monsanto's verified statement of attorneys' fees.

Motions to Amend April 20, 2006 Opinion, Memorandum and Order and Rule 59(e) Motion to Alter or Amend Award of Contract Attorneys Fees and Costs in April 20, 2006 Opinion, Memorandum and Order

Defendant asks the Court to amend its April 20, 2006 Opinion, Memorandum and Order as to the finding that Monsanto is entitled to attorneys' fees and costs pursuant to the parties' contract, and to amend the Order to reduce the assessed royalty of $55.00 per bag of saved seed.

Attorneys' Fees and Costs

Defendant argues that Monsanto's attorneys fees and costs are limited to those fees and costs recoverable under 35 U.S.C. § 285 and 28 U.S.C. §§ 1920 and 1821(b) and that the contract provision is not enforceable because it was on the back side of the document, the side of the document which he did not sign.

Enforceability

Defendant argues that the contract provision in which it was agreed that Monsanto would be entitled to recover its attorneys' fees and other costs should not be enforced because it was on the back side of the Technology Agreement and as such, he was unaware of it. He further argues that the clause regarding attorneys' fees and costs was in the "fine print" and that the front side of the document, which included the statement that defendant "acknowledged] that [he has] read and understood] the terms and conditions of this

Agreement and that [he] agree[d] to them" was also in small print, and no attention was drawn to this provision on the front side of the document. Since defendant claims he was unaware of the backside provision, he argues that he is not bound by the provision.

Monsanto counters this argument by directing the Court's attention to this exact issue decided by the Federal Circuit in *Monsanto v. McFarling*, 302 F.3d 1291 (Fed. Cir. 2002). In *McFarling*, the Court found that "[a] party who signs an agreement is bound by its terms, unless he was fraudulently induced not to read it or was fraudulently misled as to its content or significance." *Id.*, at 1295. There is no evidence in the record before the Court that defendant was fraudulently induced not to read the Technology Agreement, nor is there evidence that defendant was fraudulently misled as to the Agreement's contents ro significance. Defendant's arguments regarding the placement and size of the attorneys' fees and costs provision are unpersuasive in light of the *McFarling* Court's holding and reasoning therefore.

Limitation of Attorneys' Fees and Costs

Defendant urges the Court to Amend the award of contract attorneys' fees and costs in the Opinion, Memorandum and Order entered on April 20, 2006, to limit those fees under the provisions of 35 U.S.C. § 285 and 28 U.S.C. §§ 1920 and 1821(b). With respect to limitation under 35 U.S.C. § 285, the Court has herein found this to be an exceptional case, and that Monsanto is entitled to attorneys' fees in accordance with Section 285. Therefore, the motion appears to be

moot as to that limitation. Inherent in the parties' agreement is that the attorneys' fees are "reasonable," as are the attorneys' fees awarded pursuant to 35 U.S.C. § 285.

Furthermore, the Court agrees with Monsanto that the parties to a contract can agree to an award of attorneys' fees and costs to a prevailing party incurred through enforcing the provisions of the contract. "Missouri law permits an award of attorneys' fees in a variety of circumstances, *see Skyles v. Burge,* 830 S.W.2d 497, 499 (Mo.Ct.App.1992), including when a contract provides for such an award, *see Jackes-Evans Mfg. Co. v. Christen,* 848 S.W.2d 553, 557 (Mo.Ct.App.1993); *Gibson v. Gibson*, 687 S.W.2d 274, 277 (Mo.Ct.App.1985)." *Farmland Industries, Inc. v. Frazier-Parrott Commodities,* 111 F.3d 588, 591 (8th Cir. 1997). See also *TCBY Systems, Inc. V. RSP Co., Inc.,* 33 F.3d 925, 931 (8th Cir. 1994)(costs).

The Technology Agreements' provisions regarding costs and attorneys' fees are not contrary to 35 U.S.C. § 285 and 28 U.S.C. §§ 1920 and 1821. As plaintiff correctly argues, defendant's reliance on the cited cases is misplaced. Defendant seeks to limit the award of costs and attorneys' fees based on cases which involve regulatory statutes. The Court agrees that in the context of a *regulatory statute*, the parties are not at liberty to defeat that statute's application by private contractual provisions, *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S.211, 223-24 (1986). No regulatory statute is at issue here, rather, the statutes under which defendant is seeking to limit the award of costs and attorneys' fees are statutes which provide alternative awards of costs and attorneys' fees. With

regard to attorneys' fees, in the absence of the Technology Agreement, the statute, 35 U.S.C. § 285, provides the patent holder, in exceptional circumstances, its attorneys' fees for infringement when such fees are not ordinarily awarded.

Costs are therefore awarded pursuant to the Technology Agreement in the amount of $164,608.03, as requested in Monsanto's Bill of Costs.

Reduction of Royalty

Defendant also asks the Court to reduce the award of $55.04 per bag of saved soybean seed. Defendant has presented nothing to establish that this amount "shocks the conscience" so that it should be reduced. See, *Monsanto v. Ralph*, 382 F.3d 1374, 1384.

Motion for Prejudgment Interest

Monsanto seeks prejudgment interest in the amount of $63,026.95. Monsanto has submitted a schedule showing that this interest was calculated at prime rate, compounded annually, and beginning on May 1, 2003 ending on June 1, 2006.

General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983), held that prejudgment interest should ordinarily be awarded in patent cases, but that such an award is not automatic. "For example, it may be appropriate to limit prejudgment interest, or perhaps even deny it altogether, where the patent owner has been responsible for undue delay in prosecuting the lawsuit. There may be other circumstances in which it may be appropriate not to award prejudgment

interest." *Bio-Rad Laboratories, Inc. v. Nicolet Instrument Corp.*, 807 F.2d 964, 967 (Fed. Cir. 1986). Applying these standards, the Court concludes that there are no circumstances precluding awarding prejudgment interest. Prejudgment interest is awarded at 9%, the simple prejudgment rate, in accordance with 35 U.S.C. § 284 in the amount of $63,026.95.

Motion for Bill of Costs: 28 U.S.C. § 1920

In addition to costs in accordance with their Technology Agreement, Monsanto seeks its costs pursuant to 28 U.S.C. § 1920. Defendant objects to the Bill of Costs submitted by plaintiff. Costs are taxed pursuant to 28 U.S.C. § 1920 as follows:

Fees for service of summons and subpoena: $435.60

Fees of the court reporter for all or any part of transcripts necessarily obtained for use in the case: $12,765.15.[1]

Defendant objects to this amount because plaintiff did not designate whether the transcripts were originals or copies, or for how many copies, or what

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[1] Exhibit B details the transcripts. The total amount according to Exhibit B for transcripts is $12,765.15. However, the Court's calculations total $13,603.35. This discrepancy appears to be a failure to include the last transcript charge of $838.20. Because plaintiff has requested $12,765.15, the Court will assume plaintiff is not requesting this amount.

part of the transcript was necessarily obtained for use in the case. Counsel for plaintiff represents to the Court that these amounts are for transcripts obtained for use in the case; defendant has produced no evidence that counsel's representation is inaccurate. As such, the Court finds the amount taxable.

Fees and disbursements for printing: $1,008.38.

Fees for witnesses:

Defendant objected to Monsanto's request for witness fees in the amount of $104,979.31. In response, Monsanto argued that it would be entitled to this amount pursuant to 28 U.S.C. § 1821. Monsanto, however, advises the Court that "[e]ven though Monsanto would still be entitled certain witness fees pursuant to 28 U.S.C. § 1920 analysis, Monsanto will eliminate these fees from the alternative calculation of costs." In light of this, the Court will tax no costs for witness fees under 28 U.S.C. § 1920.

Fees for exemplification and copies of papers necessarily obtained for use in the case: $17,792.83.

The Court agrees with Monsanto that the fees for copies in this particular case is proper. Although defendant objects to these fees, the Court is cognizant of all the exhibits used in this case and throughout its pendency. Monsanto was required to obtain copies of documents from outside sources in addition to copying various documents in support of its position. Voluminous exhibits were listed on the Trial Exhibit list, which were required in order to overcome

defendant's various defense tactics. As such, the Court finds that Monsanto is entitled to the amount of fees requested for copies and exemplification.

Other costs: Monsanto again advises the Court that it agrees that the other costs in the amount of $27,626.76 need not be awarded pursuant to 28 U.S.C. § 1920.

Based on the forgoing, Costs are taxed pursuant to 28 U.S.C. § 1920 in the amount of: **$30,542.99.**[2]

Accordingly,

IT IS HEREBY ORDERED that plaintiff's Motion for Attorneys' Fees Pursuant to 35 U.S.C. § 285, [Doc. No. 200], is granted. The amount of attorneys' fees to be awarded will be determined after plaintiff responds to defendant's chronological objections to plaintiff's verified statement of attorneys' fees.

IT IS FURTHER ORDERED that defendant's Motion for Amendment of April 20, 2006 Opinion, Memorandum and Order, [Doc. No. 202], is denied.

IT IS FURTHER ORDERED that defendant's Second Motion for Amendment of April 20, 2006

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[2] This amount is lower than the total amount of costs taxed herein. The Court is uncertain as to how Monsanto arrived at this amount, however, in light of the fact that it is lower than the total amount requested, less those items Monsanto voluntarily abandoned, the Court will tax costs in the amount Monsanto requests in its Reply to the objections.

Opinion, Memorandum and Order, [Doc. No. 212], is denied.

IT IS FURTHER ORDERED that plaintiffs' Motion for Prejudgment Interest, [Doc. No. 203], is granted.

IT IS FURTHER ORDERED that plaintiffs' Motion for Treble Damages Pursuant to 35 U.S.C. § 284, [Doc. No. 206] is granted to the extent that plaintiff is awarded enhanced damages in the amount of $10,000 additional damages.

IT IS FURTHER ORDERED that plaintiffs' Motion for Bill of Costs, [Doc. No. 208], is granted. Costs are taxed in the amount of $30,542.99, pursuant to 28 U.S.C. § 1920.

IT IS FURTHER ORDERED that defendant's Rule 59(e) Motion to Alter or Amend Award of Contract Attorneys' Fees and Costs in April 20, 2006 Opinion, Memorandum and Order, [Doc. No. 241], is denied.

Dated this 25th day of July, 2006.

/s/
HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:04CV425 HEA

[Filed April 20, 2006]

MONSANTO COMPANY and	)
MONSANTO TECHNOLOGY LLC	)
Plaintiffs,	)
	)
vs.	)
	)
LOREN DAVID,	)
Defendant.	)
	)

OPINION, MEMORANDUM AND ORDER

A bench trial in this matter took place from February 13, 2006 through February 21, 2006. From the evidence adduced at trial, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

Plaintiff Monsanto Company is a company organized and existing under the laws of the State of Delaware with its principal place of business in St.

Louis, Missouri. Plaintiff Monsanto Technology LLC is a subsidiary of Monsanto and is a holding company for its intellectual property.[1] Monsanto is in the business of developing, manufacturing, licensing and selling agricultural biotechnology, agricultural chemicals, and other agricultural products Monsanto developed and sells Roundup branded herbicides. The active ingredient in Roundup brand herbicides and similar non-selective herbicides is glyphosate. Roundup brand herbicides and their generic counterparts are referred to as "glyphosate-based herbicides." A "non-selective herbicide" means that it will kill all types of plants, whether the plant is a weed, soybean plant, or any other type of plant. In addition to glyphosate-based herbicides, there are also a variety of non-glyphosate-based herbicides or "conventional" herbicides available to farmers.

Monsanto developed new plant biotechnologies, one of which is marketed by Monsanto as Roundup Ready brand crop seed. Roundup Ready technology, also called the Roundup Ready trait, has been utilized in several agricultural crops, including soybean seed. On October 4, 1994, the 5,352,605 patent (the '605 patent) was issued and assigned to Monsanto for an invention of Chimeric Genes for Transforming Plant Cells Using Viral Promoters, and since that date, Monsanto has been and continues to be, the owner of the '605 patent. This invention is in the fields of biotechnology and plant biology and genetics. One or more of the claims of the '605 patent encompass Roundup Ready soybean

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[1] Plaintiffs will be collectively referred to as "Monsanto" throughout this Memorandum and Order.

seeds and plants grown therefrom. All Roundup Ready soybean seeds and plants contain the chimeric gene described in claim 1 of the '605 patent. All Roundup Ready soybean seeds and plants contain the chimeric gene described in claim 2 of the '605 patent. The Roundup Ready trait causes crops grown from Roundup Ready seed to be resistant to Roundup brand and similar glyphosate-based herbicides. Soybean plants grown from seed which do not have the Roundup Ready trait will die if Roundup brand or similar glyphosate-based herbicides are sprayed over the top of such soybean plants.

Monsanto placed the required statutory notice that its Roundup Ready biotechnology was patented on the labeling of all commercial bags containing Roundup Ready soybean seed. Monsanto would not negotiate a license with growers that would permit the grower to make unlimited use of the Roundup Ready technology.

Roundup Ready soybean seed is popular among farmers. More than ninety percent (90%) of soybean acres in the United States are planted with soybean seed containing the Roundup Ready trait.

Defendant is an individual who has attained the age of majority and is a resident and domiciliary of the State of North Dakota. He is a commercial grower of, among other things, soybeans and corn. Defendant has conducted farming operations involving soybeans and corn for many years, including the years 2002 through the present. He farms these crops in Richland and Sargent Counties, North Dakota along with Robert and Marshall Counties, South Dakota. Additionally, defendant owns acreage in Barnes and Stustsman

Counties, North Dakota along with Covington and Grant Counties, South Dakota and Beltrami County, Minnesota. This remaining acreage is farmed by defendant to crops other than soybeans or corn, rented to other farmers, or enrolled in one or more Conservation Reserve Programs, in which case, defendant receives compensation from the government in exchange for not farming this acreage.

Defendant executed a Monsanto Technology Agreement on May 3, 1999. This Agreement states, *inter alia*, that defendant agreed to use the seed containing Monsanto gene technology solely for planting a single commercial crop. He further agreed to not supply any of this seed to any other person or entity for planting, and not to save any crop produced from the seed for replanting, or supply saved seed to anyone for replanting. Defendant knew that soybean seed containing Monsanto's patented Roundup Ready biotechnology could not be saved and replanted and that the harvest from newly purchased Roundup Ready soybean seed must be sold as a commodity prior to 2003.

Defendant provides planting dates for his crops as a part of his application for crop insurance. The final planting dates, which were provided by defendant, reflected on the crop insurance records were listed as defendant having finished planting his soybean acreage on May 6, 2003, with the exception of a single 116 acre filed planted on May 26, 2003.

In 2003, defendant planted both newly purchased Roundup Ready soybean seed and soybean seed that had been saved from a prior year's harvest. These

saved seeds were stored in one or more of defendant's grain bins. Defendant purchased 1,638 fifty pound units of Roundup Ready soybean seed in 2003.

In 2003, defendant purchased 1,100 gallons of glyphosate-based herbicides.

Sampling of defendant's soybean plant material, including soybean seed pods, remaining in defendant's 2003 soybean fields was conducted on April 23 and 24, 2004 by Agricultural Sampling Services. Dr. Koppatschek and his sampling team conducted tests on these samples. These tests were performed according to Standard Operating Procedures, which were developed to provide a meaningful basis to provide statistically reliable inferences about what is contained in a particular field based upon sampling that is conducted. The Standard Operating Procedures have been reviewed and audited by the United States Environmental Protection Agency. These tests confirmed the presence of the Roundup Ready trait in all of the samples collected and tested.

The samples were forwarded by Dr. Koppatschek's sampling team to Monsanto's laboratory for independent testing. The results of these tests confirmed the presence of the Roundup Ready trait in all field samples. The results conclusively demonstrate that all of defendant's 2003 soybean acreage was planted with Roundup Ready soybean seed.

Defendant testified that he purchased Roundup Ready soybean seed from Red River Grain prior to May 31, 2003, and that the 993 units of seeds were planted prior to May 31, 2003. The Court finds this testimony

unreliable. The testimony of Jennifer Wulfekuhle, office manager for Red River Grain, establishes that she wrote an invoice for the purchase of 993 units of Roundup Ready soybean seed to defendant on May 31, 2003. The invoice for this seed is dated May 31, 2003. Defendant's attempt to explain away the date is unpersuasive. Defendant's self serving explanation does not overcome the unbiased testimony and documentation from Red River Grain. This purchase occurred after defendant had finished planting all of his fields.

Defendant's purchase of 1,100 gallons of glyphosate based herbicides in 2003 is consistent with the planting of Roundup Ready soybeans. Defendant claims to have purchased conventional herbicides on May 17, 2003 in the amount of $17,009.00 from Benes Service. However, the invoice copy dated May 17, 2003 is too "coincidental" to the invoice dated May 17, 2004 in the exact same amount to be credible, particularly in light of the lack of production of the original. The Court finds defendant's explanation of the circumstances surrounding his claimed purchase of conventional herbicides on May 17, 2003 not believable.

Throughout the course of this litigation, defendant has varied his claims regarding his soybean planting in 2003. He has testified that he planted the perimeters of his fields with Roundup Ready soybeans. He has testified that he planted conventional seed on some fields. He had testified that he planted all newly purchased Roundup Ready seed in 2003. These inconsistencies demonstrate defendant's unreliability.

Defendant has failed to overcome the documentation and results of scientific testing which establish that his 2003 soybean crops were planted with Roundup Ready soybean seed. He has failed to overcome the unbiased documentation evidence he purchased insufficient quantities of Roundup Ready seed in 2003 to plant his entire crop with new seed.

Various testimony was presented regarding how much seed was planted and how many acres were planted in 2003. Defendant testified at different times to different amounts of seed and different amounts of acreage. There are no absolutely ascertainable numbers from which the Court can determine the exact amount of seed used, nor the exact amount of land planted with Roundup Ready soybean seed. The Court, therefore will average the minimum and maximum. The range of acreage planted was from 2,172 to 2,272. Thus the average total acreage planted in 2003 was 2,222 acres. Testimony established that defendant planted seed at rates of between 95 pounds per acre to 120 pounds per acre. The average of these rates is 107.5 pounds per acre. If we multiply 2,222 acres by 107.5 pounds per acre and then divide the result by 50 pounds per unit we achieve 4,755 fifty pound units.[2] Defendant purchased 645 fifty pound units of Roundup Ready soybean seed in 2003. With that figure in mind, 4,755 minus 645 units equals 4,110 units of infringing soybean seed.

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[2] The number is actually 4,755.18 fifty pound units. The Court, for practical purposes has rounded the number to 4,755.

Defendant signed the license agreement which prohibited him from saving and planting the saved seed. Further, he acknowledged that he was aware that he was so prohibited. His replanting of the saved seed therefore was clearly willful.

Conclusions of Law

The use of a patented product without authority is patent infringement. 35 U.S.C. § 271(a). This section provides, "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States. . .during the term of the patent therefor, infringes the patent." This provision is clear and unambiguous. In cases construing the '605 patent, courts have consistently found that planting saved Roundup Ready soybean seeds constitutes infringement of the patent. *Monsanto v. McFarling*, 363 F.3d 1336 (Fed. Cir. 2004)(affirming district court's grant of summary judgment on the issue); *Monsanto v. Ralph*, 382 F.3d 1374 (Fed.Cir. 2004); *Monsanto v. Scruggs*, 342 F.Supp. 584, 593-597 (N.D. Miss. 2004).

Defendant's reliance on *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124 (2002) and the Plant Variety Protection Act of 1970 in support of his position that he is not subject to plaintiff's claim for infringement is clearly misplaced and unavailing. In *Monsanto v. McFarling*, decided subsequent to *J.E.M.*, the Federal Circuit rejected the possibility that the PVPA preempted an infringement claim. "[T]he right to save seed of plants registered under the PVPA does not impart the right to save seed of plants patented under the Patent Act." *McFarling*,

302 F.3d at 1298-99. See also, *Monsanto v. McFarling*, 363 F.3d 1336 (Fed. Cir. 2004); *Monsanto v. Swann*, 308 F.Supp.2d at 946, *Monsanto v. Good*, 2004 WL 1664013 (D.N.J. 2004); *Monsanto v. Scruggs*, 249 F.Supp.2d 746.

Furthermore, defendant's other arguments have been rejected. Regarding the patent's lack of reference to "seeds" or "plants" has likewise been rejected. See, *Monsanto v. Scruggs*, 342 F.Supp 2d 584, 597 (N.D. Miss. 2004). The *Scruggs* Court also rejected defendant's argument that the patents comply with the written description requirement of 35 U.S.C. § 112. *Id* at 600-601. Encompassed within this finding was the *Scruggs* Court's rejection of defendant's argument that a "deposit" of biological material was required by the written description requirement. *Id*.

Defendant's attempt to avoid a finding of infringement based on the argument that the compositions of matter claimed in the '605 patent are patentable subject matter only in their purified and isolated state is also without merit. The patent claims chimeric, *i.e.*, man-made genes, not genes that naturally occur. The "isolated and purified" requirement therefore does not apply. *Monsanto v. Good*, 2004 WL 1664013, at *5.

Patent infringement damages are warranted pursuant to 35 U.S.C. § 284. This section provides: "upon the finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use of the invention by the

infringer, together with interest and costs as fixed by the court." 35 U.S.C. § 284.

Both parties have submitted expert testimony regarding what a reasonable royalty should be in this matter.[3] As the *Ralph* Court held

> [defendant's] suggestion that the Technology Fee is an established royalty for the use that he made of the seed can be rejected as unsound. One of the most fundamental tenets of patent law is that a patent gives its owner the right to exclude others from making, using, selling, offering to sell, or importing the patented subject matter. 35 U.S.C. § 271 (2000). If the patent owner chooses not to totally exclude others, he or she may negotiate with a potential licensee to permit the licensee to make, use, sell, or import the patented subject matter under whatever terms the parties agree upon. Monsanto has chosen, as is its prerogative, to permit farmers to plant a commercial crop of the patented seeds in a single season in exchange for payment of the Technology Fee and a promise, manifested through the Technology Agreement, not to save those seeds

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[3] Monsanto filed motions in limine to exclude defendant's experts. In light of the fact that this matter was before the Court and not a jury, the Court's gatekeeper function under Rule 702 of the Federal Rules of Civil Procedure and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), was not required with respect to these experts. The Court, in considering all experts in this case remained cognizant of the role and function of experts as defined in Rule 702 and *Daubert*.

that are harvested at the end of the growing season for replanting production, sale, or transfer to others. The Technology Fee is a royalty, to be sure, but it is a royalty for only a narrow, contractually agreed-upon, use of the seed. It is undisputed in the record that Monsanto has not grated licenses to anyone to plant, produce, or transfer saved seed. The Technology Fee is therefore not an established royalty for planting or transferring saved seed, the uses that [defendant] made of the patented invention.

[Defendant] argues that no same farmer would ever negotiate a royalty in excess of his anticipated profits. However, although an infringer's anticipated profit from use of the patented invention is "[a]mong the factors to be considered in determining" a reasonable royalty, *see Georgia-Pacific* 318 F.Supp. At 1120, the law does not require that an infringer be permitted to make a profit. And, where, as here, a patentee is unwilling to grant an unlimited license, the hypothetical negotiation process has its limits. As we explained in *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320 (Fed Cir. 1987), the "imposition on a patent owner who would not have licensed his invention for [a given] royalty is a form of compulsory license, against the will and interest of the person wronged, in favor of the wrongdoer." *Id.* at 1328; *see also Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 n. 13 (Fed.Cir. 1995) ("the hypothetical negotiation is often referred to as a 'willing licensor/willing licensee'

> negotiation. However, this is an inaccurate, and even absurd, characterization when, as her the patentee does not wish to grant a license."). Just as [defendant] asserts that he would never pay Monsanto such a royalty just to be able to save seed for replanting or transfer, Monsanto would apparently never permit [defendant] to save seed for replanting or transfer at any price.

Ralph, 382 F.3d at 1383-84.

Infringing use of Monsanto's patented Roundup Ready soybean confers substantial benefits on the infringer and places risk on Monsanto as the patent holder for the invention. As such, Monsanto is entitled to a reasonable royalty of $55.04/bag. This figure is based upon the expert testimony presented, the actions taken subsequent to Monsanto's investigations and the Federal Circuit's conclusion in *Ralph* that this amount is not excessive. The Court therefore finds that Monsanto is entitled to 2,222 acres of soybean seed at a rate of 107.5 pounds per acre. Therefore, a total of 4,110 pounds of infringing seed multiplied by 55.04 per bag results in a reasonable royalty of $226,214.40.

Because the Court has found that defendant knowingly planted saved Roundup Ready soybean seed during the 2003 crop year, he is also liable for breach of the licensing agreement. Defendant voluntarily signed the Technology Agreement at issue. In that agreement, he agreed not to save seed. Monsanto is therefore entitled to judgment as a matter of law. Under the contract, defendant agreed that the technology provider, Monsanto, is entitled to recover

its full amount of legal fees and other costs of enforcing the agreement.

Accordingly,

IT IS HEREBY ORDERED that Monsanto is awarded a reasonable royalty for defendant's knowing infringement of Monsanto's patent in the amount of $226,214.40.

IT IS FURTHER ORDERED that Monsanto is entitled to recover its legal fees and other costs of enforcing the agreement.

IT IS FURTHER ORDERED that Monsanto's Motions in Limine, [Doc. No's. 111, and 120], are denied as moot.

IT IS FURTHER ORDERED that judgment will be entered upon the resolution of all remaining issues.

Dated this 20th day of April, 2006.

/s/
HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

APPENDIX F

DAY 1

COURTROOM MINUTE SHEET - CIVIL

DATE: 2/13/06

CASE NO.: 4:04CV425 HEA

JUDGE: H.E. AUTREY

COURT REPORTER: A. Daley/ L. Shruin

Monsanto Company et al v. David

ATTORNEY () for Pltf (): Joseph Orlet; Matthew Grant; Adam Miller

ATTORNEY () for Dft (): Bruce Johnson

(x) Parties present for (JURY/NON-JURY) trial.
() Jury empaneled and sworn.

(x) Opening statements of (x) Pltf / (x) Dft made.

(x) Pltf evidence commenced / resumed
and / but not concluded.

* * *

(x) Proceedings to continue tomorrow / Monday at 9:30 a.m. / p.m.

(x) Mtns hrd/Argued; Ruled per HEA as follows: Mtn #89 (Denied); Mtn #113 (Denied w/o prejudice); Mtn #114 (Denied as Moot); Mtn #118 (Denied as Moot); Mtn #123 (Denied w/o Prejudice)

COURT TIME 9:55 am to 5:35 pm

Lunch Break 12:40 pm to 1:30 pm

DEPUTY CLERK: M. Mosley

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2007-1104

[Filed April 14, 2008]

MONSANTO COMPANY, Plaintiff-Appellee,	)
and	)
MONSANTO TECHNOLOGY LLC, Plaintiff-Appellee,	)
v.	)
LOREN DAVID, Defendant-Appellant.	)

ORDER

A petition for rehearing en banc having been filed by the Appellant, and the matter having been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 21, 2008.

FOR THE COURT,

/s/ Jan Horbaly /JB
Jan Horbaly
Clerk

Date: 04/14/2008

cc: Bruce E. Johnson
Seth P. Waxman

MONSANTO COMPANY V DAVID, 2007-1104
(DCT - 4:04-CV-425)

APPENDIX H

7 U.S.C. § 2321

2321. Establishment

There is hereby established in the Department of Agriculture an office to be known as the Plant Variety Protection Office, which shall have the functions set forth in this chapter.

7 U.S.C. § 2401

2401. Definitions and rules of construction

(a) Definitions

As used in this chapter:

(1) Basic seed

The term "basic seed" means the seed planted to produce certified or commercial seed.

(2) Breeder

The term "breeder" means the person who directs the final breeding creating a variety or who discovers and develops a variety. If the actions are conducted by an agent on behalf of a principal, the principal, rather than the agent, shall be considered the breeder. The term does not include a person who redevelops or

rediscovers a variety the existence of which is publicly known or a matter of common knowledge.

(3) Essentially derived variety

(A) In general

The term "essentially derived variety" means a variety that –

(i) is predominantly derived from another variety (referred to in this paragraph as the "initial variety") or from a variety that is predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;

(ii) is clearly distinguishable from the initial variety; and

(iii) except, for differences that result from the act of derivation, conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

(B) Methods

An essentially derived variety may be obtained by the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, transformation by genetic engineering, or other method.

(4) Kind

The term "kind" means one or more related species or subspecies singly or collectively known by one common name, such as soybean, flax, or radish.

(5) Seed

The term "seed", with respect to a tuber propagated variety, means the tuber or the part of the tuber used for propagation.

(6) Sexually reproduced

The term "sexually reproduced" includes any production of a variety by seed, but does not include the production of a variety by tuber propagation.

(7) Tuber propagated

The term "tuber propagated" means propagated by a tuber or a part of a tuber.

(8) United States

The terms "United States" and "this country" mean the United States, the territories and possessions of the United States, and the Commonwealth of Puerto Rico.

(9) Variety

The term "variety" means a plant grouping within a single Botanical taxon of the lowest known rank, that, without regard to whether the conditions for

plant variety protection are fully met, can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, distinguished from any other plant grouping by the expression of at least one characteristic and considered as a unit with regard to the suitability of the plant grouping for being propagated unchanged. A variety may be represented by seed, transplants, plants, tubers, tissue culture plantlets, and other matter.

* * * *

7 U.S.C. § 2422

2422. Content of application

An application for a certificate recognizing plant variety rights shall contain:

(1) The name of the variety except that a temporary designation will suffice until the certificate is to be issued. The variety shall be named in accordance with regulations issued by the Secretary.

(2) A description of the variety setting forth its distinctiveness, uniformity, and stability and a description of the genealogy and breeding procedure, when known. The Secretary may require amplification, including the submission of adequate photographs or drawings or plant specimens, if the description is not adequate or as complete as is reasonably possible, and submission of records or proof of ownership or of allegations made in the application . . . .

7 U.S.C. § 2543

2543. Right to save seed; crop exemption

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by the person from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on the farm of the person, or for sale as provided in this section. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority sf the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that the actions of the purchaser constitute and infringement.

7 U.S.C. § 2544

2544. Research exemption

The use and reproduction of a protected variety for plant breeding or other bona fide research shall not constitute an infringement of the protection provided under this chapter.

35 U.S.C. § 101

101. Inventions patentable

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

35 U.S.C. § 112

112. Specification

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

* * * *

35 U.S.C. § 161

161. Patents for plants

Whoever invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propagated plant or a plant found in an uncultivated state, may obtain a patent therefor, subject to the conditions and requirements of this title.

The provisions of this title relating to patents for inventions shall apply to patents for plants, except as otherwise provided.

35 U.S.C. § 162

162. Description, claim

No plant patent shall be declared invalid for noncompliance with section 112 of this title if the description is as complete as is reasonably possible.

The claim in the specification shall be in formal terms to the plant shown and described.

35 U.S.C. § 163

163. Grant

In the case of a plant patent, the grant shall include the right to exclude others from asexually reproducing the plant, and from using, offering for sale, or selling the plant so reproduced, or any of its

parts, throughout the United States, or from importing the plant so reproduced, or any parts thereof, into the United States.

35 U.S.C. § 164

164. Assistance of Department of Agriculture

The President may by Executive order direct the Secretary of Agriculture, in accordance with the requests of the Director, for the purpose of carrying into effect the provisions of this title with respect to plants (1) to furnish available information of the Department of Agriculture, (2) to conduct through the appropriate bureau or division of the Department research upon special problems, or (3) to detail to the Director officers and employees of the Department.

35 U.S.C. § 284

§ 284. Damages

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed. Increased damages under this paragraph shall not apply to provisional rights under section 154(d) of this title.

The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.

35 U.S.C. § 285

§ 285. Attorney fees

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

Federal Rule of Evidence 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Federal Rule of Evidence 703. Bases of Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Federal Rule of Evidence 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * *

(6) **Records of Regularly Conducted Activity.** -- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

APPENDIX I

Fritz Koppatschek Expert Report
Trial Exhibit 358

Report Date: 9/01/04 Project Code: 10791-04-11

David Farms Final Sampling Report

Situation

Field sampling was conducted on Loren David Farms on April 23, and 24, 2004 when Agricultural Sampling Services sampled approximately 2106.5 soybean acres. Present during sampling were Shawn Bainbridge, Clayton Kinsler, Fritz Koppatschek, Bob Royer, and Jared Alsdorf of Ag Sampling Services. Samples were taken from the 2003 soybean crop. Sampling began at approximately 8:00 a.m. on the 23rd and concluded at approximately 9:00 a.m. on the 24th.

Fields Sampled

Standard Ag Sampling Services procedures were used to sample the fields. The acres sampled were divided into the following fields.

[Table omitted in this appendix]

Fields not Identified to Ag Sampling Service

At the time of sampling, Mr. And Mrs. David identified fields to Ag Sampling Service personnel. After review of USDA Farm Service Agency records it was discovered that they did not identify the following fields for sampling.

[Table omitted in this appendix]

Lab Analysis

After reviewing lab results, all soybean fields sampled tested positive for the CP4 EPSPS protein associated with the Roundup Ready gene. These fields totaled 2106.5 acres.

Chain of Custody

All samples were stored and locked in the Ag Sampling trailers. Samples were transferred to BioLab Solutions.

Additional Information

The camcorder tape and field description forms used are in the possession of Ag Sampling Services.

Attachments

- Agricultural Sampling Services standard Operating Procedure
- BioLab Solutions Report
- Vitae of Fritz Koppatschek

Previous Depositions / Testimony by Fritz Koppatschek

- Monsanto vs. Ray Dawson October 1999
- Monsanto vs. Paul Mayfield January 2000
- Monsanto vs. Mitchell Scruggs January 2001
- Monsanto vs. Homan McFarling April 2001
- River Springs vs. Sandoz May 2001
- Monsanto vs. Dean Ford March 2004

Compensation

Field sampling is billed at $8-16 per acre. Expert witness fees are billed at $125 per hour.

/s/ _____ 9/2/04

Fritz Koppatschek Ph.D.

CONFIDENTIAL

ELISA Analysis for CP4 EPSPS
Project Number: 10791-04-11
Grower: David (ND)
Report Date: May 17, 2004

Sample Characteristics

Sampled By: Ag Sampling Services

Laboratory Analyst: Brian Ojala

Lab Received Date: 4/24/04

Extractions: Allison Gast

Crop: Soybean

Lab Extraction Dates(s) 4/30, 5/3, 5/4, & 5/5/04

Tissue Type: Seed

ELISA Analysis Date(s): 5/3 & 5/17/04

Sample Numbers

Sample numbers are assigned by Ag Sampling Services and labeled according to the following format:

Field # - Sample #

Summary of Sample Preparation and Extraction For CP4 EPSPS ELISA Analysis

Soybean Seed Sample Preparation & Extraction

The extraction was performed as described in SOP ANA 01: "Procedure for Extraction and ELISA Analysis of CP4 EPSPS in Soybean Tissue." Seed samples were stored at ambient room temperature until processed. Three seeds from each sample bag were randomly selected for analysis. The seeds were crushed into fine particles using a mortar and pestle. Each seed sample was extracted using a tissue to buffer ratio of 1 mg: 100 µL, where the buffer is 1X PBS-0.5% Tween 20. Seed extracts were homogenized using a Geno/Grinder 2000 for 3 minutes at approximately 1,500 strokes per minute and then centrifuged at 4 °C for 10 minutes at 10,000 rpm. Seed extracts were stored at -20°C until analyzed.

The QC positive was taken from Roundup Ready® soybean seen by DeKalb (brand DKB36-51/variety 03544870. The QC negative was taken from nontransgenic soybean seeds by Asgrow (variety A3244).

CP4 EPSPS ELISA Analysis

The analytical procedure is a direct sandwich ELISA using horseradish peroxidase conjugate, SOP ANA1 was followed. Samples, CP4 EPSPS protein standards, buffer blanks, and QC samples were all loaded in triplicate on the microplate at 50 µL per well. The conjugate (Sigma® Anti-Protein 4 Peroxidase Conjugate, diluted to a final concentration of 1:3000 with 1X PBS / 0.05% Tween buffer) was loaded at 100 µL per well. The substrate used was 3,3',5,5'-tetramethylbenzidine (TMB). Soybean seed samples with positive control ratios greater or equal to 0.4 are considered positive for CP4 EPSPS protein

Soybean Seed – CP4 EPSPS ELISA Results:

Sample #	ELISA Result	Sample #	ELISA Result
1-4	(+) Positive	5-19	(+) Positive
1-7	(+) Positive	5-25	(+) Positive
1-13	(+) Positive	5-28	(+) Positive
1-17	(+) Positive	6-6	(+) Positive
1-20	(+) Positive	6-8	(+) Positive
1-22	(+) Positive	6-9	(+) Positive
1-25	(+) Positive	6-14	(+) Positive
1-29	(+) Positive	6-17	(+) Positive

2-3	(+) Positive	6-22	(+) Positive
2-8	(+) Positive	6-28	(+) Positive
2-10	(+) Positive	6-30	(+) Positive
2-16	(+) Positive	7-1	(+) Positive
2-20	(+) Positive	7-5	(+) Positive
2-21	(+) Positive	7-9	(+) Positive
2-25	(+) Positive	7-11	(+) Positive
2-31	(+) Positive	7-13	(+) Positive
3-5	(+) Positive	7-18	(+) Positive
3-6	(+) Positive	7-24	(+) Positive
4-1	(+) Positive	7-27	(+) Positive
4-3	(+) Positive	7-33	(+) Positive
4-10	(+) Positive	8-5	(+) Positive
4-13	(+) Positive	8-9	(+) Positive
4-18	(+) Positive	8-13	(+) Positive
4-23	(+) Positive	8-15	(+) Positive
4-27	(+) Positive	8-18	(+) Positive
4-30	(+) Positive	8-21	(+) Positive
5-1	(+) Positive	8-30	(+) Positive
5-7	(+) Positive	8-32	(+) Positive
5-10	(+) Positive	9-1	(+) Positive

5-12	(+) Positive	9-6	(+) Positive
5-15	(+) Positive	9-11	(+) Positive

Soybean Seed – CP4 EPSPS ELISA Results (continued):

Sample #	ELISA Result	Sample #	ELISA Result
9-13	(+) Positive	15-4	(+) Positive
9-19	(+) Positive	15-9	(+) Positive
9-22	(+) Positive	15-15	(+) Positive
9-25	(+) Positive	15-17	(+) Positive
9-30	(+) Positive	15-20	(+) Positive
10-6	(+) Positive	15-21	(+) Positive
10-9	(+) Positive	15-24	(+) Positive
10-11	(+) Positive	15-29	(+) Positive
10-14	(+) Positive	15-31	(+) Positive
11-1	(+) Positive	15-37	(+) Positive
11-2	(+) Positive	15-38	(+) Positive
13-2	(+) Positive	15-46	(+) Positive
31-8	(+) Positive	15-52	(+) Positive
13-9	(+) Positive	16-2	(+) Positive
13-11	(+) Positive	16-4	(+) Positive

13-13	(+) Positive	16-11	(+) Positive
13-18	(+) Positive	16-16	(+) Positive
13-24	(+) Positive	16-19	(+) Positive
14-2	(+) Positive	16-23	(+) Positive
14-4	(+) Positive	16-29	(+) Positive
14-10	(+) Positive	16-31	(+) Positive
14-11	(+) Positive	16-35	(+) Positive
14-13	(+) Positive	16-39	(+) Positive
14-21	(+) Positive	17-1	(+) Positive
14-27	(+) Positive	17-5	(+) Positive
14-29	(+) Positive	17-10	(+) Positive
15-2	(+) Positive	17-12	(+) Positive